Supreme Court, U.S.
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IN THE

Supreme Court of the United States

HAROLD D. EYL, an individual,
Petitioner,

v.

CIBA-GEIGY CORPORATION, a New York Corporation, NORTHEAST COOPERATIVE, a Cooperative Association, and CITY OF WISNER, a political subdivision,
Respondents.

On Petition for a Writ of Certiorari
to the Supreme Court of Nebraska

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Federal, Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136v, preempt state-law personal-injury claims premised on the defendants' failure to warn a bystander of a herbicide's hazards and how to avoid those hazards?

PARTIES

All parties are listed in the caption. Petitioner Harold D. Eyl was the plaintiff below. Respondents Ciba-Geigy Corporation and Northeast Cooperative were defendants below. The City of Wisner is also named as a respondent pursuant to this Court's Rule 12.6. The City was originally named as a defendant in the trial court, but it realigned itself as a plaintiff and supported the positions taken by petitioner Eyl, including those presented in this petition.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Harold D. Eyl respectfully petitions this Court for a writ of certiorari to review the decision of the Supreme Court of Nebraska.

OPINIONS BELOW

The Supreme Court of Nebraska's opinion is reported at 650 N.W.2d 744 (Neb. 2002), and is reproduced in the appendix at Pet. App. 1a. The Supreme Court of Nebraska's unreported order denying petitioner's motion for rehearing is reproduced at Pet. App. 39a. The trial court's unreported order denying respondents' first motion for summary judgment is reproduced at Pet. App. 30a. The trial court's unreported order denying respondents' second motion for summary judgment is reproduced at Pet. App. 36a.[1]

JURISDICTION

The judgment of the Supreme Court of Nebraska, reversing the jury verdict in petitioner's favor and ordering that the case be dismissed, was entered on September 6, 2002. Pet. App. 1a. The order denying petitioner's motion for rehearing was entered on November 14, 2002. Pet. App. 39a. On January 30, 2003, Justice Thomas granted petitioner's application for an extension of time to file this petition for a writ of certiorari to and including April 13, 2003. This Court has jurisdiction under 28 U.S.C. § 1257.

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[1]Unless otherwise stated, references to "respondents" are to Ciba-Geigy Corporation and Northeast Cooperative only. In the courts below, respondent City of Wisner agreed with petitioner Eyl on the issues presented in this petition. *See supra* at ii.

STATUTE INVOLVED

The section of the Federal Insecticide, Fungicide, and Rodenticide Act directly at issue in this case, 7 U.S.C. § 136v, provides:

Authority of States

(a) In general

A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.

(b) Uniformity

Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.

STATEMENT OF THE CASE

A Nebraska jury awarded petitioner Harold Eyl approximately $2.1 million dollars as a result of the disabling injuries he suffered from his exposure to Pramitol 5PS ("Pramitol"), commonly-referred to as "Total Kill," an herbicide manufactured by respondent Ciba-Geigy Corporation and distributed by respondent Northeast Cooperative. Pet. App. 1a; Trial Transcript ("Tr.") 55. The Nebraska Supreme Court held that, as a matter of federal law, Mr. Eyl is barred from pursuing his Nebraska state-law product-liability claims. Specifically, that court ruled that Mr. Eyl's damages claims are preempted by the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), a statute enacted to protect people and the environment from hazards posed by pesticides,

herbicides, and similar products.[2]

As explained in more detail below, this Court should grant review because there is a direct and protracted series of conflicts among the federal and state courts on the question presented and because the Supreme Court of Nebraska's decision is at odds with FIFRA's text and purpose.

A. The Structure Of FIFRA

The Supreme Court of Nebraska's ruling is based on 7 U.S.C. § 136v(b), which overrides certain state pesticide "labeling or packaging" "requirements" that conflict with requirements imposed under FIFRA. The proper construction of that provision must be determined in light of FIFRA's substantive requirements.

FIFRA is the federal component of a tripartite scheme in which pesticides are regulated at the federal, state, and local levels. *Wisconsin Public Intervenor v. Mortier,* 501 U.S. 597 (1990). FIFRA requires that the federal Environmental Protection Agency ("EPA") make certain regulatory decisions regarding pesticides, but the Act rarely forbids a state or local government from supplementing EPA decisions. For example, a pesticide generally may not be sold or used in the United States without an EPA registration. 7 U.S.C. § 136a(a). Although state and local governments generally may not permit the sale or use of any pesticide not registered with EPA, they may regulate or ban outright the sale and use of a federally registered pesticide. 7 U.S.C. § 136v(a). For instance,

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[2]The product involved in this case is an herbicide, one of the types of products regulated under FIFRA. For ease of reference, this petition uses the term "pesticide" to refer generally to all such products.

Nebraska may restrict the use of sodium chlorate, the active ingredient in Pramitol, or ban its use entirely. In this way, federal pesticide regulation establishes a floor that may be exceeded by additional state regulations. Moreover, FIFRA gives states the lead role in enforcing pesticide use restrictions. 7 U.S.C. § 136w-1.

Unlike federal statutes governing cigarette and smokeless tobacco labels, FIFRA does not mandate precise wording for pesticide labels. *Cf.* 15 U.S.C. §§ 1333, 4402(a)(1). Nor do EPA's regulations dictate any specific language to be used for the majority of pesticide labels.[3] *Compare* 21 C.F.R. §§ 801.420 & 801.430 (FDA regulations demanding specific label warnings for particular medical devices). Rather, as part of an application for a pesticide registration, the manufacturer submits not only health and environmental data, but also a draft label. 7 U.S.C. § 136a(c)(1)(C); 40 C.F.R. § 152.50(e). EPA has made clear that "[t]he registrant must take responsibility for quality control of the product's composition and for adequate labeling describing the product, its hazards and uses." 53 Fed. Reg. 15,952, 15,956 (May 4, 1988).

EPA will register a pesticide if the manufacturer meets FIFRA's requirements. 40 C.F.R. § 152.112. The statute requires that the pesticide's composition warrants the claims made for it, that its labeling and other materials comply with FIFRA's requirements, and that it will not generally cause unreasonable adverse effects on the environment when used in

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[3]EPA requires signal words and precise precautionary statements for pesticides in three of four toxicity categories. 40 C.F.R. §§ 156.60-.78. Prior to 2001, signal words were required for all four toxicity categories. *See* 40 C.F.R. § 156.10(h) (2000).

accordance with widespread and commonly recognized practice. 7 U.S.C. §§ 136a(c)(5)(A)-(D).

As to the product label, FIFRA and EPA establish certain minimum requirements: Pesticide labels must contain an EPA registration number, the registrant's name and address, the pesticide's name, brand, or trademark, the net weight or other measure of content, the use classification of the pesticide, an ingredient statement, directions for use, a warning or cautionary statement that is adequate to protect health and the environment, and, for pesticides that are highly toxic to humans, specific signal words and a description of appropriate first-aid treatment. 7 U.S.C. § 136(q)(1)(D),(G) & (2)(A)-(D); 40 C.F.R. § 156.10(a)(1); *see supra* note 3. Any information required under FIFRA to be on a pesticide's label must be prominently and conspicuously placed in comparison to other labeling information that is not federally mandated. 7 U.S.C. § 136(q)(1)(E); 40 C.F.R. § 156.10(a)(2).

A registrant's use of the label submitted with its registration application does not necessarily satisfy the registrant's FIFRA (or other) obligations. To the contrary, a pesticide is misbranded if, notwithstanding EPA's registration of the pesticide and acceptance of the label, it fails to contain whatever additional warnings are necessary to protect against unreasonable adverse health and environmental effects. 7 U.S.C. § 136(q)(1)(F) & (G). Indeed, EPA has recognized that "[f]or liability reasons, companies often voluntarily provide additional information on the label, particularly in the area of precautionary statements." 49 Fed. Reg. 37,960, 37,971 (Sept. 26, 1984). Neither FIFRA nor EPA regulations prohibit the inclusion of additional label information or warnings, provided that the information does not violate any specific statutory or regulatory requirement. *Id.*

Because EPA depends so heavily on manufacturer

submissions, FIFRA imposes continuing obligations on registrants to submit complete, up-to-date information to EPA. Registrants have ongoing obligations to provide to EPA all factual information that they have regarding unreasonable adverse environmental effects, 7 U.S.C. § 136d(a)(2), and ongoing obligations to ensure that their labeling complies with FIFRA's requirements. 7 U.S.C. §§ 136(q)(1), 136j(a)(1)(E). Thus, FIFRA anticipates that a manufacturer may have to make labeling changes after registration of its product. FIFRA provides that "[i]f the labeling or formulation for a pesticide is changed, the registration shall be amended to reflect such change if the Administrator determines that the change will not violate any provision of this [Act]." 7 U.S.C. § 136a(f)(1). In other words, the onus for deciding whether a label change is necessary falls on the registrant, which must draft the revised label and submit it to EPA for review. 40 C.F.R. § 152.44.

Although the provision at issue here — 7 U.S.C. § 136v(b) — preempts state "labeling or packaging" requirements "in addition to or different from" FIFRA requirements, FIFRA limits "labeling" to "the written, printed, or graphic matter on, or attached to, the pesticide or device or any of its containers or wrappers," or other detached written matter accompanying the pesticide, such as an instructional booklet, that serves the same purpose as a label. 7 U.S.C. § 136(p)(1) & (2)(A).[4] The Act expressly leaves manufacturers

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[4]7 U.S.C. § 136(p), provides in relevant part:

Label and labeling.—

(1) Label.—The term "label" means the written, printed, or graphic matter on, or attached to, the pesticide or device or any of its containers or wrappers.

(2) Labeling.—The term "labeling" means all labels and all other written, printed, or graphic matter—

(A) accompanying the pesticide or device at any time; or

(continued...)

of registered pesticides many other unrestricted means of conveying information to purchasers and users. For example, EPA's regulations identify the following means of conveying information: "[b]rochures, pamphlets, circulars and similar material offered to purchasers at the point of sale or by direct mail; [n]ewspapers, magazines, newsletters and other material in circulation or available to the public; [b]roadcast media such as radio and television; [t]elephone advertising; and [b]illboards and posters." 40 C.F.R. § 152.168(b). Unlike labeling, manufacturers do not submit such materials to EPA for review and approval as part of the registration process.

If a pesticide label contains false or misleading statements or lacks directions for use and warnings that are adequate to protect health and the environment, the pesticide is misbranded. 7 U.S.C. §§ 136(q)(1), 136j(a)(1)(E), 136j(a)(2)(C) & (M). In an administrative action to cancel a pesticide's registration or to seize or bar use or sale, EPA registration is not a defense. 7 U.S.C. § 136a(f)(2). Violations warranting EPA action include labeling that lacks required information and products that cause unreasonable environmental effects even when used as directed on the label. 7 U.S.C. §§ 136j & 136k(b)(3).

FIFRA does not provide a remedy for individuals who sustain injuries from pesticide use or exposure, and thus state-law damages actions provide the only means of compensation for such injuries.

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[4](...continued)

(B) to which reference is made on the label or in literature accompanying the pesticide or device ....

B. Factual Background And Proceedings Below

1. Purchase of Pramitol. In the spring of 1993, while petitioner Harold Eyl was employed by the City of Wisner as a maintenance worker, respondent Northeast Cooperative recommended that the City purchase Pramitol, which, as noted above, is an herbicide manufactured by respondent Ciba-Geigy. Following that recommendation, the City purchased a 20-pound bag of the product on April 2, 1993. Tr. 489. Mr. Eyl did not participate in the purchase. Tr. 498.

2. Harold Eyl's Injuries. On April 9, 1993, Mr. Eyl was assigned to lay pea rock around playground equipment at River Park in Wisner. Mr. Eyl and other employees spent the day hauling pea rock to the playground area in a wheelbarrow, encircling the playground equipment with poles, and filling in the enclosed areas with pea rock. Pet. App. 2a.

That same morning, Donald Bode, the city employee who had purchased the Pramitol, applied Pramitol throughout the playground area to prevent weeds from growing. Pet. App. 2a. Mr. Eyl did not assist in the application of the Pramitol; in fact, he never applied chemicals or herbicides for the City of Wisner. Tr. 959.

It was foggy and damp on the morning of April 9, and Mr. Eyl wore steel-toed leather boots with rubber soles. Pet. App. 4a. While spreading the pea rock, Mr. Eyl walked through wet grass and puddles of water that contained Pramitol. When he returned home that night, his boots, socks, and pant legs were wet. Pet. App. 4a. He wore the same boots to work the next day, but never wore them again. Shortly thereafter, the boots turned white and became stiff, so Mr. Eyl threw them away to prevent his grandchildren from playing with them. Pet. App. 4a; Tr. 1002.

Within two days, Mr. Eyl's legs itched, turned red, and began to swell. Pet. App. 4a. He immediately contacted his doctor, Thomas Tibbels, who, two days later, diagnosed Mr. Eyl with peripheral dermatitis — a skin reaction to a chemical agent characterized by swelling, redness, heat, soreness, and irritation. His legs did not respond to the treatment prescribed by Dr. Tibbels, who therefore referred Mr. Eyl to Midwest Dermatology. Tr. 116, 118.

At Midwest Dermatology, doctors agreed that Mr. Eyl had contact dermatitis, and one doctor believed that the contact dermatitis had developed into a vasculitis, an inflamation of the blood vessels characterized by scarring, weakening, and narrowing of blood vessel walls and blood clots. He was then referred to the Mayo Clinic, where a vasculitis diagnosis was confirmed. Tr. 411. As a result of his exposure to Pramitol, Mr. Eyl is permanently disabled and unable to work. Pet. App. 4a.

3. Pramitol And Its Dangers. Pramitol is registered with the EPA, and its label was approved by the EPA. Its active ingredient is sodium chlorate, a chemical so reactive that it must be combined with an equal amount of another chemical to prevent the sodium chlorate from spontaneously bursting into flame. *See* Tr. 873. Pramitol can be absorbed into the human body through the skin. Tr. 872.

Various studies and scientific articles discuss the harmful effects of sodium chlorate. *E.g.*, Tr. 877-78. Sodium chlorate can damage red blood cells and cause chemical burns, skin irritation, scabs, and blisters. Tr. 875-78, 891-92. Four physicians testified at trial that, in their expert opinion, Mr. Eyl's disabling condition was caused by exposure to Pramitol. Tr. 148-149; 367-68; 568-69; 761-62.

4. Trial Court Proceedings. On April 4, 1997, Mr. Eyl filed suit in the District Court of Cuming County, Nebraska, alleging that respondents were negligent in their failure to warn him and other non-users, bystanders, and purchasers of Pramitol's inherent dangerousness. Mr. Eyl specifically pled that respondents failed to warn of the dangers of Pramitol, not through the product label, but through brochures, safety warnings, other literature, classes, and seminars. Fifth Amended Petition, ¶¶ 9 A, 9B, 10A, 10C. Mr. Eyl also alleged that both respondents failed to provide the City of Wisner brochures and other safety materials concerning the proper methods for applying Pramitol and for warning persons, including non-users and bystanders, of Pramitol's dangers. *Id.* ¶¶ 9D, 9J, 10J. In addition, Mr. Eyl alleged that respondents failed to give proper warnings to end-users, such as Donald Bode, who applied the Pramitol that caused Mr. Eyl's injuries. *Id.* ¶¶ 9K, 10K. Finally, Mr. Eyl alleged that respondents failed to warn bystanders and members of the public, such as Mr. Eyl or children playing at the River Park playground, who would not see the product label, but could nonetheless come into contact with Pramitol and needed to know of its dangers and how to avoid them. *Id.* ¶¶ 9E, 9G. Mr. Eyl's claims were premised both on negligence and strict liability theories.

In September 1998, respondents moved for summary judgment, asserting that FIFRA preempts all of Mr. Eyl's failure-to-warn and labeling-based claims and that Mr. Eyl did not state facts sufficient to support a cause of action relating to any other claims. In an order dated October 21, 1998, the court denied the motion. Pet. App. 30a. In its discussion of strict liability claims, the court observed that while "at first blush" it might appear that Mr. Eyl's claims are preempted under FIFRA, his complaint contained a design-defect claim, and the allegations of a design defect "go to disputed facts which are not labeling-based and cannot be determined as a matter of law

on a motion for summary judgment." Pet. App. 33a-34a.[5]

Respondents moved again for summary judgment in October 1999. The court granted the motion as to Mr. Eyl's strict liability claim against Northeast Cooperative alone, but otherwise allowed Mr. Eyl's claims to go forward against both respondents. Pet. App. 36a.

The case went to trial in November 1999. Considerable testimony was presented concerning methods of warning the public of pesticide hazards other than through the product label. A Ciba-Geigy witness, Dr. John Akins, acknowledged that, for some of its agricultural products, the company issues warning flags to be placed on areas where a pesticide is applied, and that it sends out pamphlets, brochures, leaflets, and newspaper articles to both suppliers and the general public that do not duplicate information on product labels. Tr. 1362, 1369-71. Ciba-Geigy also sends out flags and warnings systems for posting in pesticide application areas, but it admitted that no such information or notices were used for Pramitol. Tr. 1371, 56-57, 297-98, 336.

Similarly, Northeast Cooperative conceded that it was in a position to advise its customers of known pesticide dangers when, as in this case, it makes a purchasing recommendation to its customer. Tr. 489-90. The company's general manager, Richard Brahmer, explained that he attended chemical application courses and chemical conventions, had access to trade magazines and publications, received chemical

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[5]Despite this statement, the Nebraska Supreme Court noted that the trial court ultimately refused a jury instruction based on design defect and held that the case had presented only a series of failure-to-warn claims. Pet. App. 5a. Mr. Eyl does not challenge that ruling here.

manufacturers' advertisements, and reviewed chemical guides and "label" books. He acknowledged that these sources of information provided him safety information not on the product label, and that Northeast would often share its non-label knowledge with its customers. Tr. 829-30, 839; Pet. App. 3a. Mr. Brahmer further testified that Northeast Cooperative provides flags, posters, and other warnings to customers of certain products and that, for some products, it makes its own warnings, flags, and "post-its" regardless of what similar kinds of information it receives from the manufacturer. Tr. 844-49. However, Northeast Cooperative did not provide any such warnings for Pramitol. Tr. 844-45. Finally, Mr. Brahmer agreed that, without such non-label warnings, members of the public, including workers like Mr. Eyl, would have no knowledge of Pramitol's dangers although they could be expected to come into contact with Pramitol. Tr. 847-48; Pet. App. 3a.

After hearing all the evidence, the jury returned a verdict against Ciba-Geigy on both negligence and strict liability grounds, and against respondent Northeast Cooperative on negligence grounds alone, in the amount of $2,146,000.

5. Decision of the Supreme Court of Nebraska. The Supreme Court of Nebraska reversed the jury's verdict. Before that court, Mr. Eyl acknowledged the court's prior decision in *Ackles v. Luttrell*, 561 N.W.2d 573 (Neb. 1997), holding that FIFRA preempts failure-to-warn claims that are "label-based," but he asked the court to affirm the jury's verdict on the ground that his claims did not fit that description. Specifically, Mr. Eyl argued that, under *Ackles*, his claims did not run afoul of 7 U.S.C. § 136v(b)'s preemption of state "labeling or packaging" requirements because they did not constitute an attack on Pramitol's label, but rather are premised on forms of warning by means other than the EPA-approved label — such as through point-of-sale signs, warning flags, and consumer

notices. In this regard, Mr. Eyl also noted that, because he was a bystander, not a pesticide applicator to whom FIFRA labeling is directed, his claims were outside of FIFRA's preemptive scope. In addition, Mr. Eyl noted the Montana Supreme Court decision in *Sleath v. West Mont. Home Health Services*, 16 P.3d 1042 (2000), and the EPA's views of the topic (discussed *infra* at 15-17), both of which hold that FIFRA does not preempt *any* state-law damages actions premised on a failure to warn.

The Nebraska Supreme Court rejected all of these arguments. First, it refused to reexamine *Ackles*, and, in doing so, rejected recent authority, such as *Sleath*, in which courts ruled that section 136v(b) does not reach state-law damages actions. Pet. App. 17a. It then rejected Mr. Eyl's argument that, even if FIFRA preempts some state-law damages claims, his claims are not label-based and, thus, not preempted by FIFRA. Pet. App. 28a. On November 14, 2002, the Nebraska Supreme Court denied Mr. Eyl's timely motion for rehearing.

REASONS FOR GRANTING THE WRIT

The petition should be granted for two reasons. First, this Court should resolve the conflicts in appellate authority regarding the question whether FIFRA preempts all state-law damages claims premised on a defendant's failure to warn of a pesticide's hazards. Second, the majority of decisions on the question presented, including the decision below, have seriously erred in interpreting FIFRA and its preemption provision, have rejected EPA's contrary views, and have thereby eliminated injured persons' rights to compensation under state law contrary to Congressional intent.

A. This Court Should Resolve The Conflicts In Appellate Authority On The Question Presented.

1. Petitioner Eyl acknowledges that a large majority of FIFRA preemption decisions, including decisions of most of the federal circuit courts, hold that state damages actions are "requirements" within the preemptive reach of 7 U.S.C. § 136v(b). *See, e.g., Netland v. Hess & Clark, Inc.*, 284 F.3d 895 (8th Cir.), *cert. denied*, 123 S. Ct. 415 (2002); *Taylor Ag Industries v. Pure-Gro*, 54 F.3d 555 (9th Cir. 1995); *Worm v. American Cyanamid Co.*, 970 F.2d 1301 (4th Cir. 1992). Those decisions also hold that damages actions alleging that the defendant failed to warn of a pesticide's dangers are preempted by 7 U.S.C. § 136v(b), under which states are prohibited from issuing certain "requirements" concerning pesticide "labeling or packaging" that are "in addition to or different from" FIFRA requirements.

Several decisions, however, directly conflict with the majority view and hold that state damages actions are not "requirements" within the meaning of section 136v(b). *See* Pet. App. 16a-17a (acknowledging conflict). Those rulings include the early decision of the District of Columbia Circuit in *Ferebee v. Chevron Chemical Co.*, 736 F.2d 1529 (D.C. Cir. 1984), and the relatively recent decisions of the Montana Supreme Court in *Sleath v. West Mont Home Health Services, Inc.*, 16 P.3d 1042 (Mont. 2000), *cert. denied sub nom., Dow AgroSciences LLC v. Sleath*, 122 S. Ct. 40 (2001), and the Oregon Court of Appeals in *Brown v. Chas. H. Lilly Co.*, 985 P.2d 846 (Or. App. 1999), *rev. denied*, 6 P.3d 1098 (Or. 2000). In addition, the California Court of Appeal held in 1998 that FIFRA does not expressly preempt state-law damages actions. *Etcheverry v. Tri-Ag Services, Inc.*, 76 Cal. Rptr.2d 466 (Cal. App. 3d Dist. 1998). Although the California Supreme Court reversed that decision, it did so by a narrow four-to-three margin, over two forceful dissents. *See Etcheverry v. Tri-Ag*

Services, Inc., 993 P.2d 366 (Cal. 2000). Mr. Eyl believes that the minority position better comports with the text of section 136v, the structure of FIFRA, and Congressional intent. For present purposes, however, the question is not which position is correct, but that there is a division among the courts under which state-law damages claims may (or may not) go forward based solely on geographical and jurisdictional happenstance. This Court should grant certiorari to establish uniformity on the question presented.

This division in appellate authority persists even though EPA's views directly conflict with the majority view. The agency has filed *amicus curiae* briefs in private litigation to express its view that FIFRA does not preempt *any* state-law damages claims and to explain how various courts have misinterpreted federal law and FIFRA's legislative history. The agency's most comprehensive brief — signed by the EPA's general counsel as well as an Assistant United States Attorney General — was filed in the *Etcheverry* litigation in California. *See* Brief *Amicus Curiae* for the United States in Support of Plaintiffs-Appellants in *Etcheverry v. Tri-Ag Service, Inc.*, No. S072524 (Cal. S. Ct. filed March 1999) (hereafter "U.S. *Etcheverry* Br."). For the Court's convenience that brief is available at www.citizen.org/documents/USEtcheverry Brief.pdf.[6]

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[6]The EPA and the Justice Department took the same position in a Fifth Circuit case. *See* Brief *Amicus Curiae* for the United States in Support of Appellants in *Hart v. Bayer Corp.*, No. 98-60496 (5th Cir. filed March 1999) (available at www.citizen.org/documents/USHartBrief.pdf). The Fifth Circuit did not reach the preemption issue, holding only that FIFRA preemption does not create federal question jurisdiction and remanding the case to the state court from which it was removed. *Hart v. Bayer Corp.*, 199 F.3d 239 (5th Cir. 2000).

The EPA's *Etcheverry* brief explains why the text, structure, and history of FIFRA do not support preemption of state damages claims and why the EPA has an interest in assuring that the courts do not undermine the ability of state tort systems to provide compensation to individuals who have sustained personal injuries from pesticides. U.S. *Etcheverry* Br. at 8-33. The United States summarized its views as follows:

> While the term "requirements" may encompass common law duties in some contexts, the text, legislative history, and purposes of FIFRA demonstrate that Congress had no intent that the use of the term "requirements" in section 136v(b) would extinguish state law damages actions. When section 136v(b) was enacted in 1972, state law actions against pesticide manufacturers for failure to warn were a commonplace and uncontroversial feature of the legal landscape. No evidence from the text or legislative history of FIFRA suggests that Congress had any intent to extinguish those actions or that Congress even considered doing so. Indeed, Congress amended FIFRA in 1972 out of increasing concern for human health and the environmental effects of pesticides such as DDT. Given that FIFRA establishes no private damages remedy for those injured by pesticides, it would be astonishing that, without any discussion, Congress would have intended to deprive injured persons of all means of relief.

Id. at 5-6.

The EPA's position is important because this Court has sometimes given weight to an agency's views of the preemptive scope of the statute that it is charged with implementing, both

as expressed in agency regulations, *see Medtronic, Inc. v. Lohr*, 518 U.S. 470, 496-97 (1996); *id.* at 505-06 (opinion of Breyer, J.); *Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 714-15 (1985), and in the form of briefs filed in private litigation. *See Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861, 883 (2000); *American Airlines, Inc. v. Wolens*, 513 U.S. 220, 232-34 (1995). The EPA's position is not, of course, dispositive on the merits and should only be accorded the weight that its persuasive power deserves, but it provides a further compelling reason to grant review. The majority view in the lower courts effectively abrogates traditional state damages remedies based on an interpretation of a federal statute that is flatly at odds with the interpretation of the agency authorized by Congress to enforce that statute. That situation should not persist without this Court's blessing.

2. The conflict among the courts regarding whether FIFRA preempts *any* duty-to-warn claims is not the only split in authority presented by this case. Even if section 136v(b) preempts common-law claims challenging the adequacy of a pesticide's label, it does not preempt failure-to-warn claims based on the theory that a defendant should have warned through means other than labeling. This conclusion follows directly from the language of section 136v(b), which only preempts state requirements "for labeling or packaging," and from this Court's ruling in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992).

As discussed in greater detail in Part B below, one of the statutory provisions at issue in *Cipollone* preempted state-law requirements "with respect to advertising or promotion" of cigarettes. *See* 15 U.S.C. § 1334(b). *Cipollone* held that, although that provision preempts failure-to-warn claims based on advertising or promotion, claims based on the theory that the defendants should have warned through other means are not preempted. 505 U.S. at 524-25 (failure-to-warn claim not

preempted to extent based on "actions unrelated to advertising or promotion").

Under FIFRA, "labeling" does not include oral statements, point-of-sale signs or pamphlets, or advertising and promotional material. *See* 7 U.S.C. § 136(p) (defining "label" and "labeling"); *supra* note 4. As noted above, Mr. Eyl's complaint specifically alleged that respondents are liable to him because of their failure to warn him of Pramitol's dangers through non-label means, for instance, via brochures, flags, and posters that would have warned people to stay away from Pramitol and/or to remove it from their bodies as soon as exposure occurred. Thus, consistent with *Cipollone*, Mr. Eyl's claims are not preempted to the extent that they challenge respondents' failures to advise about the risks of Pramitol through non-label means.

The argument that FIFRA has no preemptive effect on modes of warning other than the product label is particularly persuasive in cases like this one, where the plaintiff was not the pesticide *applicator for whom the pesticide labeling is intended*, but, rather, a bystander, who would have been warned, if at all, *only* by means other than the FIFRA-approved label. The Nebraska Supreme Court's holding that FIFRA preempts claims by bystanders against both pesticide manufacturers and distributors (Pet. App. 17a-29a), would apply to any member of the public, including a two-year-old using the playground equipment at River Park, just as forcefully as it was applied to Mr. Eyl here. Yet, even respondents have never suggested that such bystanders can be warned by the product label. As the Second Circuit has put it, "FIFRA 'labeling' is designed to be read and followed by the end-user." *New York State Pesticide Coalition v. Jorling,* 874 F.2d 115, 119 (2d Cir. 1989) (holding that preemption does not extend to non-label forms of state regulation).

The conclusion that FIFRA does not apply to non-label warnings is confirmed by decisions of the Ninth and Second Circuits holding that even direct state regulation of communications by pesticide manufacturers are not preempted by 7 U.S.C. § 136v(b) where such regulations affirmatively require communications by means other than labeling. *See Chemical Specialties Manufacturers Ass'n v. Allenby*, 958 F.2d 941, 946 (9th Cir.) ("labeling" under FIFRA does not include point-of-sale signs required under California's Proposition 65), *cert. denied,* 506 U.S. 825 (1992); *Jorling,* 874 F.2d at 119 ("labeling" under FIFRA does not include posting of signs to warn of impending use of dangerous chemicals, required by New York law). However, other appellate decisions, most notably *Papas v. Upjohn Co.*, 985 F.2d 516, 519 (11th Cir. 1993), have arrived at exactly the opposite conclusion. Pet. App. 27a-28a (following *Papas,* and explicitly rejecting decision in *Allenby*). If review is granted here, it will resolve this important conflict as well.

3. The appellate courts are also divided on a related FIFRA preemption question: whether FIFRA preempts a pesticide user's state-law failure-to-warn claim that a pesticide was not effective for its intended use, *e.g.,* a farmer's claim that a FIFRA-registered pesticide's ineffectiveness resulted in crop damage. *Compare American Cyanamid Company v. Geye*, 79 S.W.3d 21 (Tex. 2002) (some such claims not preempted), *pet. for cert. pending*, No. 02-367 (filed Sept. 4, 2002); *Kawamata Farms v. United Agri Prods.*, 948 P.2d 1055, 1076-77 (Haw. 1997) (some such claims not preempted), *with Etcheverry*, 993 P.2d 366 (crop-damage claims preempted); *Taylor Ag Industries v. Pure-Gro*, 54 F.3d 555 (9th Cir. 1995) (same). A grant of certiorari here would, if ultimately decided in petitioner Eyl's favor, necessarily resolve the conflict in the crop-damage

cases.[7]

B. The Decision Below Incorrectly Construes The Scope Of Preemption Under FIFRA.

1. The decision below, like the decisions of most other courts to have addressed the scope of FIFRA preemption, is flawed because it erroneously holds that FIFRA's express preemption provision applies to state-law damages claims. The courts that have found preemption of damages claims under 7 U.S.C. § 136v(b) have relied almost exclusively on a rote application of this Court's decision in *Cipollone*, 505 U.S. 504 (1992). *Cipollone* held that the word "requirement," as used in the preemption provision of the Public Health Cigarette Smoking Act of 1969, could include common-law claims for damages, including claims for failure to warn. 505 U.S. at 520-24. The courts have erroneously concluded that this holding — concerning the use of a particular word in one statute enacted

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[7]On November 12, 2002, this Court invited the Solicitor General to express the views of the United States in *Geye v. American Cyanamid*, perhaps because the EPA has taken the position that efficacy claims are not preempted by FIFRA. *See* U.S. *Etcheverry* Br. at 33-42 (explaining that product efficacy claims also are not preempted by FIFRA because, among other reasons, EPA does not conduct efficacy review for pesticides) (available at www.citizen.org/documents/USEtcheverryBrief.pdf). We believe that this case presents a better vehicle for addressing FIFRA preemption issues than does *Geye* for two reasons: First, unlike the Nebraska Supreme Court's decision below, the decision in *Geye* is a non-final decision from a state Supreme Court, and jurisdiction in this Court appears to be lacking because there is no final judgment as required by 28 U.S.C. § 1257. Second, this case provides a basis for deciding the broader, more important, question whether FIFRA expressly preempts *any* failure-to-warn claims, not just those based on product efficacy.

by Congress in 1969 — necessarily means that "requirement" as used by Congress in 1972 in FIFRA's preemption provision reaches common-law damages claims. A fair reading of FIFRA's preemption provision, however, reveals that Congress did not intend preemption of damages claims at all. *See* U.S. *Etcheverry* Br. at 9 (acknowledging that in some contexts "'requirements' may encompass obligations imposed through common law damages actions[,]" and explaining that the "text, legislative history, and purposes of FIFRA demonstrate, however, that, as it is used in section 136v(b), the term 'requirements' means direct commands imposed by law regarding the contents of labels [and] does not include state damages actions"); *see also Lee v. Madigan*, 358 U.S. 228, 231 (1959) ("Only mischief can result if those terms [appearing in different statutes] are given one meaning regardless of the statutory context.").

In *Cipollone*, the statute contained the specific warning to be included on each label, that is, *Congress itself drafted the required warning language. See* 15 U.S.C. § 1333 (stating exact warnings to appear on cigarette packages and advertisements). It was Congress' very specific and unusual action — and only that specific action — that the preemption provision sought to protect from conflicting state regulation. Congress had dictated the warnings, and thus the Act preempted challenges to the adequacy of those warnings.

By contrast, with regard to preemption under FIFRA, Mr. Eyl's common-law claims in no way challenge a congressional determination, or even an agency determination, that the label must state certain cautionary language and no other. Quite the contrary, the label is drafted by the *registrant*, *i.e.*, the pesticide manufacturer. Although FIFRA specifies warning "signal words" and precautionary statements for certain toxicity categories, those warnings have nothing to do with the types of warnings that might have prevented Mr. Eyl's

injuries here, such as that bystanders not come in contact with water containing Pramitol or that Pramitol be removed from the body immediately after contact.

Even where specific warnings are required, pesticide manufacturers must include additional warnings or cautionary statements on the labels if they are needed to adequately protect health and the environment. 7 U.S.C. § 136(q)(1)(F) & (G); 40 C.F.R. §§ 156.10(a)(1); 156.10(i)(1)(i). Whether or not one of the specific toxicity warnings is required, the label must state "[a]ny limitations or restrictions on use to prevent unreasonable adverse effects." 40 C.F.R. § 156.10(i)(2)(x). FIFRA places full responsibility on the manufacturer to provide adequate warnings and directions for use on its product's label. 7 U.S.C. § 136a(c)(5). FIFRA prescribes only general requirements for pesticide labels and leaves it to the manufacturer to devise a label that will adequately protect against adverse effects, including damage to people, animals, and crops. *Id.* §§ 136(j), 136a(c)(5); 40 C.F.R. § 156.10(i)(2)(iii),(vi),(vii),(x). If a registrant learns of inadequacies in its label after the EPA has registered the pesticide, the registrant must promptly inform the EPA of the inadequacies and revise its label to provide adequate warnings and directions for use. 7 U.S.C. § 136a(f)(1). Accordingly, respondents were not only free at any time to provide information to purchasers and users that would have enabled Mr. Eyl to avoid injury, they were obligated under FIFRA to do so.

Indeed, one manifestation of FIFRA's registrant-driven scheme of labeling, as EPA has acknowledged, is that, "[f]or liability reasons, companies often voluntarily provide additional information on the label, particularly in the area of precautionary statements." 49 Fed. Reg. 37,960, 37,971 (Sept. 26, 1984). The understanding that the federal regulatory system and state-law tort compensation would co-exist makes sense in the FIFRA context where registrants draft pesticide

labels and are subject to general, continuing duties to provide adequate warnings.

2. The legislative history of the provision at issue in *Cipollone* and the one at issue here also differ dramatically. In *Cipollone*, the Court focused on a comparison of the 1969 preemption provision with its predecessor from the 1965 Cigarette Act. 505 U.S. at 520-23. Whereas the 1965 version preempted only "statements," the 1969 version preempted "requirements or prohibitions." The Court determined that the change in language must have some significance and, on that basis, found that common-law claims came within the scope of the preemption provision of the 1969 Act. 505 U.S. at 522-23. The Court's opinion makes clear that the dispositive factor was the contrast between the 1965 and 1969 provisions, not simply the use of the word "requirement" in the 1969 provision. Indeed, although the 1965 Act preempted all state-imposed "statement[s] relating to smoking and health . . . *required*" in cigarette advertising, the Court held that it did not preempt *any* common-law claims. *Id.* at 518-20.

Here, by contrast, the legislative history of FIFRA provides no evidence that Congress intended to preempt state damages actions. Aside from technical changes, section 136v(b) has not been amended since its enactment in 1972, and nothing analogous to the interpretive guide provided by the amendments to the 1965 Cigarette Act is present in the history of section 136v(b). Furthermore, FIFRA's extensive legislative history does not mention preemption of state damages claims. *See, e.g.*, S. Rep. No. 92-838, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S.C.C.A.N. 3993; *see also* U.S. *Etcheverry* Br. at 22-31 (explaining that FIFRA's legislative history involving 25 days of hearings and numerous committee reports does not even hint at intent to preempt any state damages actions). As the United States has noted, the conclusion that Congress did not enact sweeping "tort reform" in 1972 is

underscored by the fact that, in nearly a century of case law prior to FIFRA's passage, the courts uniformly held that pesticide manufacturers had a duty to warn under state law. *Id.* at 19-22.

3. Another fundamental problem with the lower courts' FIFRA preemption analyses premised on *Cipollone* is that they overlook the placement of the preemption provision, subsection 136v(b), in the context of the section as a whole. That section, entitled "Authority of States," begins with an *anti*-preemption clause:

> A State may regulate the sale or use of any federally registered pesticide or device in the State, but only to the extent the regulation does not permit any sale or use prohibited by this subchapter.

7 U.S.C. § 136v(a). The preemption clause, which follows immediately, 7 U.S.C. § 136v(b), begins with the words "Such State," thus tying the preemption provision to the activities of the state discussed in section 136v(a), quoted above. Section 136v(a) addresses states' general authority to "regulate" the sale and use of pesticides, *not* the states' authority to award compensation through damages remedies. As this Court has stated, the use of the word "regulate" refers not to common-law damages remedies, but rather to positive-law enactments of legislative and regulatory bodies. *See Cipollone*, 505 U.S. at 519, 523 (in 1965 Cigarette Act, "'regulation' most naturally refers to positive enactments" of legislatures and agencies, "not to common-law damages actions"). It follows, therefore, from the structure and wording of section 136v, that subsection (b) also does not encompass damages liability because it refers to states only in their regulatory, not adjudicatory, capacity.

This conclusion is consistent with other decisions of this

Court, which have noted that Congress can, and does, rationally distinguish state positive law and common law, preempting the former but not the latter. *See Sprietsma v. Mercury Marine*, 123 S. Ct. 518, 527 (2002) (preemption of state positive law, but not state common law "does not produce anomalous results. It would have been perfectly rational for Congress not to pre-empt common-law claims, which — unlike most administrative and legislative regulations—necessarily perform an important remedial role in compensating accident victims.") (citing *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 251 (1984)); *Cipollone*, 505 U.S. at 518 ("there is no general, inherent conflict between [express] federal preemption of state [regulatory] warning requirements and the continued vitality of state common-law damages actions"); *Goodyear Atomic Corp. v. Miller*, 486 U.S. 174, 185-86 (1988) ("The effects of direct regulation ... are significantly more intrusive than the incidental effects of such an award provision. ...Congress may reasonably determine that incidental regulatory pressure is acceptable, whereas direct regulatory authority is not."); *Silkwood*, 464 U.S. at 256 (despite federal preemption of state regulatory authority, state-law punitive damages awards not preempted even though "regulatory in the sense that a nuclear plant will be threatened with damages liability if it does not conform to state standards").[8]

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[8]This Court's recent decision in *Sprietsma* also demonstrates that the term "requirement" does not always refer to state damages actions, but that the term, like all statutory language, derives its meaning from context. There, the Court held that the Federal Boat Safety Act's preemption provision, 46 U.S.C. § 4306, which preempts certain state laws, regulations, or standards "imposing *a requirement*," does *not* reach common-law claims. *See Sprietsma*, 123 S. Ct. at 524, 526-27. The Nebraska Supreme Court did not have the benefit of *Sprietsma*, which was handed down 19 days after the Nebraska Supreme Court denied rehearing.

In addition, section 136v(a) only bars states from permitting a pesticide sale or use prohibited by FIFRA, but it does not restrict states' authority to impose restrictions in addition to those imposed by FIFRA. Subsection (a) thus allows a state to require manufacturers to comply with state requirements in addition to the federal requirements before they may market their products in that state. For example, a state may, consistent with both sections 136v(a) and (b), ban a registered pesticide from sale in that state — an act quite drastic in comparison to providing a tort remedy. *See* S. Rep. No. 92-970, 92d Cong., 2d Sess. (1972), *reprinted in* 1972 U.S.C.C.A.N. 4092, 4111-12 ("Local governments could, however, prohibit or restrict the sale or use of pesticides within their jurisdiction."). Indeed, states have done so. *See, e.g.*, Iowa Code Ann. § 206.32 (banning sale, purchase, application, and use of chlordane); Md. Agric. Code § 5-210.5 (restricting use of various pesticides). And Nebraska has the power, under state law, to restrict or ban any pesticide, including Pramitol, that is deemed a hazard to the citizenry. *See* Neb. Stat. Ann. § 2-2626(3)(f). Moreover, a state could also require that pesticide manufacturers submit results of safety and efficacy testing to a state environmental agency, as Nebraska law provides. *Id.* § 2-2629(3). Or a state could require that pesticide manufacturers include warnings about risks to people or the environment in any advertising within that state.

Indeed, a state could require that manufacturers, as a condition to marketing in that state, compensate consumers for damage to people, land, or crops caused by their products. *Cf.* Neb. Rev. Stat. § 2-2645 (administrative procedure for claims for damages from pesticides). The state could do so without imposing any requirement on product labels. Such a requirement would reflect a state's decision that, "if it must abide by EPA's determination that a label is adequate, [the state] will nonetheless require manufacturers to bear the risk of any injuries that could have been prevented ...." *Ferebee*, 736

F.2d at 1541. Or the state might decide, based on the principle of strict liability, that manufacturers should be held liable for damage caused by their products, without regard to fault. Under either rationale, a plaintiff's verdict would not require the manufacturer to change its label. It would only require, consistent with subsection (a)'s grant of authority to states to regulate pesticide "use," that the manufacturer pay damages associated with the use of its product. The federal labeling requirements and the state use requirement would not conflict, and the state requirement would not run afoul of section 136v(b)'s proscription against "any requirements for labeling or packaging in addition to or different from those required" under FIFRA.

Moreover, the anti-preemptive force of section 136v(a) is particularly strong in cases like this one, where, as noted above (at 18), the injured, yet foreseeable, plaintiff, was neither a purchaser nor an end-user and was not in the target audience of the product label. In FIFRA, Congress made no effort to regulate the relationship between pesticide manufacturers and distributors, on the one hand, and bystanders and other non-users, on the other. Thus, it is difficult to conceive how a state-law duty imposing an obligation on that relationship can be preempted by FIFRA. The only way to provide warnings to bystanders like Mr. Eyl is through the kind of non-label "regulation" of pesticide "sale or use" that states are specifically empowered to enforce under section 136v(a). *See Jorling,* 874 F.2d at 117-20; *see also, e.g., Mortier,* 501 U.S. 597.[9]

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[9]In *Mortier*, this Court held that FIFRA did not preempt a municipal ordinance that imposed, among other things, non-label-based warnings advising bystanders that a pesticide application had occurred. The Court held that the 7 U.S.C. § 136v(a)'s extension of

(continued...)

That is why states have required that manufacturers, distributors, and others provide non-label warnings to bystanders, *see, e.g., Allenby*, 958 F.2d at 946, and Nebraska law empowers the state Department of Agriculture to require notice of pesticide use to the public. Neb. St. Ann. § 2-2626(3)(f); Pet. App. 3a (respondent Northeast Cooperative was aware that state law required it to post warnings). Yet, rulings such as the Eleventh Circuit's decision in *Papas* and the decision below override Congressional intent as expressed in section 136v(a) and thereby negate the power of the states to provide such warnings.

4. Even if it could be said that the state-law "requirements" referred to in section 136v(b) encompass duties that give rise to liability for damages, section 136v(b) would not preempt Mr. Eyl's claims because those claims would not be based on duties "in addition to or different from" the duties imposed by FIFRA. As discussed above, FIFRA requires pesticide registrants to ensure that their labels and directions for use are adequate to protect against unreasonable adverse effects to health and the environment. 7 U.S.C. § 136a(c)(5). Pesticides that lack adequate warning labels are misbranded, even if EPA has approved the label. *Id.* §§ 136(q)(1)(G), 136a(f)(2).

Mr. Eyl maintains that respondents failed to warn him of the dangers associated with Pramitol 5PS. *See, e.g.*, Fifth

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[9](...continued)
authority to *states* to "regulate the sale or use of any federally registered pesticide" did not evince an implied preemption of such regulation by political *subdivisions* of states. The Court did not so much as suggest that such warnings are expressly preempted by section 136v(b) and, indeed, *Mortier* presupposes that non-label warnings are a form of state-imposed regulation specifically permitted by section 136v(a).

Amended Petition, ¶¶ 9C, 9E, 10A, 10B, 10D. Nebraska common law requires that sellers provide warnings about the risks and dangers inherent in a product's intended as well as any reasonably foreseeable uses. *See, e.g., Freeman v. Hoffman-La Roche, Inc.*, 618 N.W.2d 827, 841 (Neb. 2000). The common-law duties on which Mr. Eyl's allegations are premised thus mimic the manufacturer's duties under FIFRA, which places the burden on the registrant of testing, identifying, and labeling as to risks to people and the environment. To the extent that the claims alleged here are based on duties that parallel requirements imposed under FIFRA, *see Medtronic*, 518 U.S. at 496-97, they are not "in addition to or different from," but rather in harmony with, FIFRA's requirements and, thus, are not preempted.

This conclusion is consistent with the Court's analysis in *Medtronic*. Looking to the general language of the preemption provision of the federal Medical Device Amendments ("MDA"), 21 U.S.C. § 360k(a) — which is similar to the language of 7 U.S.C. § 136v(b) — the Court identified an "overarching concern that pre-emption occur only where a particular state requirement threatens to interfere with a specific federal interest." *Medtronic*, 518 U.S. at 500. More specifically, in considering negligent manufacturing and failure-to-warn claims, *Medtronic* made "a careful comparison between the allegedly pre-empting federal requirement and the allegedly pre-empted state requirement to determine whether they fall within the intended pre-emptive scope of the statute and regulations." *Id.* The Court concluded that the *federal* manufacturing and labeling requirements were "important but entirely generic" regulatory concerns, not the type of concerns that section 360k(a) was designed to protect from potentially contradictory state requirements. Similarly, the *state* common-law duties at issue in *Medtronic* were general duties, not developed specifically with respect to devices. Thus, the Court found that those duties were not the kind of requirements that

Congress or the FDA feared might impede the FDA's implementation and enforcement of the MDA. *Id.* at 500-01.

Like the good manufacturing requirements and general labeling requirements at issue in *Medtronic*, FIFRA's labeling requirements are general. (Indeed, the FDA's good manufacturing requirements are more comprehensive than the EPA's labeling regulations, *see* 21 C.F.R. Part 820, yet *Medtronic* found that the MDA did not preempt manufacturing claims.) The registrant, not the EPA, devises a label in accordance with FIFRA's general standards. And, as noted earlier, in contrast to the statutorily prescribed warnings of the 1969 Cigarette Act, *see Cipollone* 505 U.S. at 508, pesticide registrants are obliged under FIFRA to propose their own labels and then update them to protect against adverse health and environmental effects. *See* 7 U.S.C. § 136d(a)(2). For this reason as well, the Nebraska Supreme Court's decision cannot be squared with the text and purpose of FIFRA.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 10, 2003

SUPREME COURT OF NEBRASKA

HAROLD D. EYL, AN INDIVIDUAL, AND CITY OF WISNER, A POLITICAL SUBDIVISION, APPELLEES, V. CIBA-GEIGY CORPORATION, A NEW YORK CORPORATION, AND NORTHEAST COOPERATIVE, A COOPERATIVE ASSOCIATION, APPELLANTS.

Filed September 6, 2002. No. S-00-219

Appeal from the District Court for Cuming County: ROBERT B. ENSZ, Judge. Reversed and remanded with directions to dismiss.

William J. Brennan and Gerald L. Friedrichsen, of Fitzgerald, Schorr, Barmettler & Brennan, P.C., L.L.O., for appellants.

Susan E. Fieber, of Nolan, Olson, Hansen, Fieber, Lautenbaugh & Geren, for appellee City of Wisner.

David E. Copple and Jim K. McGough, of Copple, Rockey & McGough, P.C., for appellee Harold D. Eyl.

HENDRY, C.J., WRIGHT, CONNOLLY, GERRARD, STEPHAN, MCCORMACK, AND MILLER-LERMAN, JJ.

CONNOLLY, J.

A jury awarded appellee Harold D. Eyl a $2,146,000 verdict for injuries he sustained after he was exposed to the herbicide "Pramitol 5PS" while working for appellee City of Wisner. Pramitol is manufactured by appellant Ciba-Geigy Corporation, and the City of Wisner purchased the product from appellant Northeast Cooperative, a distributor. We granted the appellants' motion to bypass.

On appeal, the appellants argue that Eyl's claims are labeling based and preempted by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136 et seq. (1994). Eyl contends that FIFRA does not preempt his claims and asks us to overrule our decision in *Ackles v. Luttrell*, 252 Neb. 273, 561 N.W.2d 573 (1997), *cert. denied* 522 U.S. 928, 118 S. Ct. 329, 139 L. Ed. 2d 255. In the alternative, Eyl argues that because he was a bystander who should have been warned that a substance had been applied, his claims are not labeling based and that FIFRA does not apply. We determine that FIFRA applies to preempt Eyl's failure-to-warn claims and decline to overrule *Ackles*. Accordingly, we reverse, and remand with directions to dismiss.

I. BACKGROUND

On April 9, 1993, Eyl was assigned to work at River Park in Wisner, Nebraska, where employees were setting posts and laying pea rock around playground equipment. On that morning, Donald H. Bode, an employee of the City of Wisner, applied Pramitol to prevent weeds in the playground area, which would then be covered by the pea rock. Pramitol requires water to activate it, and Bode testified that he usually wore rubber boots if it was wet.

Neither Ciba-Geigy nor Northeast Cooperative provided flags or signs that could be displayed to warn others that Pramitol had been applied in the area. A representative for Ciba-Geigy admitted that in addition to product labels, the company does send out additional pamphlets, brochures, leaflets, and news articles to suppliers or communities, but that the information must be consistent with the label.

Richard Brahmer, the general manager of Northeast Cooperative, testified that on some occasions, he would give

customers information about a product that was not on the label. Brahmer stated that he was probably aware that people from the community would come in contact with Pramitol, but did not warn customers purchasing it to protect the application area. He testified that Northeast Cooperative sometimes prepared warning flags for customers of other products, because in 1996, a law was passed that required applicators to post warnings.

The label for Pramitol states, "DANGER":

> Corrosive — causes eye and skin damage. Do not get in eyes, on skin or clothing. Wash clothing after handling. Wear goggles or face shield and rubber gloves when handling. Harmful if swallowed, inhaled or absorbed through the skin. . . .
> If on skin: Remove contaminated clothing and immediately wash affected areas thoroughly with soap and water.

The material safety data sheet for Pramitol in effect on April 9, 1993, states that if skin contact occurs, the person should wash with soap and water and should remove contaminated clothing and wash before reuse. The data sheet advises users to wear rubber gloves, waterproof boots, a long-sleeved shirt, long pants, and a hat. The data sheet also states that Pramitol can cause chemical burns to the skin and lists it as being "extremely irritating" to the skin. A later data sheet, issued in 1994, lists the same precautions, but omits the reference to chemical burns and states that Pramitol is "non-irritating" to the skin.

Eyl was present when the Pramitol was applied. Eyl did not read the label or the data sheet for the product because he did not use the product. The data sheet was available at a city warehouse where the employees worked, and boots were

available for them to wear if needed. Eyl spent the day hauling pea rock to the playground area in a wheelbarrow, which required that he walk through grass and over the playground area. He testified that there was heavy fog and that the grass was wet. Puddles of water were also in the playground area.

Eyl was wearing steel-toe leather boots with oil-resistant soles. He testified that the boots became wet and stayed wet all morning. When he got home that evening, his boots, socks, and pant legs were wet. He wore the boots again for about 5 hours the next day. After April 10, 1993, the boots turned whitish in color and became stiff and brittle.

On April 11, 1993, Eyl's feet were red and sore. Eyl first saw his physician on April 13, and at that time, Eyl's feet and ankles were swollen, red, and hot. Eyl's feet later developed ulcers and remained painful. His condition did not improve, and Eyl was later seen by a dermatologist and was referred to the Mayo Clinic in Rochester, Minnesota. Because of the condition of his feet, Eyl is permanently disabled.

After Eyl presented his case, the appellants moved for a directed verdict, arguing that labeling-based state common-law failure-to-warn claims were preempted by FIFRA. The court stated that it did not view the case as a labeling-based claim that was preempted by FIFRA and denied the motion. The appellants then adduced evidence and renewed their motion for a directed verdict. The motion was overruled.

During the jury instruction conference, the court refused an instruction on design defects and stated that the case was a failure-to-warn case. The court submitted Eyl's claims to the jury on negligent failure to warn against both appellants. The court submitted to the jury Eyl's strict liability claim for a warning defect against only Ciba-Geigy. The only claims

submitted to the jury were claims based on a theory of failure to warn. The jury found for Eyl on all claims and awarded damages. The appellants moved for judgment notwithstanding the verdict. Among the issues raised, the appellants argued that Eyl's claims were preempted by FIFRA. The motions were overruled, and judgment was entered against the appellants.

II. ASSIGNMENTS OF ERROR

The appellants assign, rephrased, that the district court erred in (1) failing to find that Eyl's failure-to-warn claims are preempted by FIFRA, (2) failing to grant their motion for a directed verdict because Eyl failed to present a prima facie case, (3) failing to find that Eyl was negligent as a matter of law in a manner that entitled them to a directed verdict, (4) allowing medical experts to testify regarding causation when the experts did not know the level and extent of Eyl's exposure to Pramitol, (5) failing to grant their motions for a mistrial, (6) allowing prejudicial evidence, (7) failing to instruct the jury on the allocation of damages, (8) instructing the jury on future medical expenses, (9) instructing the jury regarding the label approved by the Environmental Protection Agency (EPA), (10) instructing the jury about Eyl's factual claims, and (11) overruling their motions for judgment notwithstanding the verdict because the verdict was excessive.

III. STANDARD OF REVIEW

[1] A directed verdict is proper at the close of all the evidence only when reasonable minds cannot differ and can draw but one conclusion from the evidence, that is to say, where an issue should be decided as a matter of law. *Bowley v. W.S.A., Inc., ante* p. 6, 645 N.W.2d 512 (2002).

[2] In order to sustain a motion for judgment notwithstanding the verdict, the court resolves the controversy

as a matter of law and may do so only when the facts are such that reasonable minds can draw but one conclusion. *Nebraska Nutrients v. Shepherd*, 261 Neb. 723, 626 N.W.2d 472 (2001).

[3,4] Statutory interpretation presents a question of law. *Manker v. Manker*, 263 Neb. 944, 644 N.W.2d 522 (2002). When reviewing questions of law, an appellate court has an obligation to resolve the questions independently of the conclusion reached by the trial court. *In re Grand Jury of Douglas Cty.*, 263 Neb. 981, 644 N.W.2d 858 (2002).

IV. ANALYSIS

1. Preemption

The appellants contend that FIFRA preempts Eyl's failure-to-warn claims because this court, and a large majority of other courts, have held that FIFRA preempts labeling-based common-law causes of action. See *Ackles v. Luttrell*, 252 Neb. 273, 561 N.W.2d 573 (1997), *cert. denied* 522 U.S. 928, 118 S. Ct. 329, 139 L. Ed. 2d 255 (holding that FIFRA preempts labeling-based common-law claims and citing cases from other jurisdictions).

Eyl, however, asserts that the claims are not preempted because after our decision in *Ackles*, the EPA, in an amicus brief filed in *Etcheverry v. Tri-Ag*, 22 Cal. 4th 316, 993 P.2d 366, 93 Cal. Rptr. 2d 36 (2000), expressed the opinion that FIFRA does not preempt common-law claims. The Montana Supreme Court then adopted the EPA's position that FIFRA does not preempt common-law claims. *Sleath v. West Mont Home Health Services*, 304 Mont. 1, 16 P.3d 1042 (2000), *cert. denied* ___ U.S. ___, 122 S. Ct. 40, 151 L. Ed. 2d 13 (2001). Eyl further argues that even if FIFRA preempts failure-to-warn claims, it does so only for labeling-based claims in which there is a failure to warn the user of the product. Eyl argues that

because he was a bystander, not a user, his claims are not labeling based.

(a) Federal Preemption: General Background

[5,6] Federal preemption arises from the Supremacy Clause of the U.S. Constitution and is the concept that state laws that conflict with federal law are invalid. U.S. Const. art. VI, cl. 2. See Scott A. Smith and Duana Grage, *Federal Preemption of State Products Liability Actions*, 27 Wm. Mitchell L. Rev. 391 (2000) (citing sources). There are three varieties of preemption: express, implied, and conflict preemption. See *id.*

[7] Express preemption arises when Congress has explicitly declared federal legislation to have a preemptive effect. It can also arise when a federal agency, acting within the scope of authority conferred upon it by Congress, has expressly declared an intent to preempt state law. *Id.* This case involves issues of express preemption.

(b) FIFRA

Originally enacted in 1947, FIFRA establishes a comprehensive regulatory scheme for the packaging of chemicals such as pesticides and herbicides. See *Ackles, supra*. The EPA is the administrative agency in charge of setting appropriate regulations. Before an herbicide may be sold, it must be registered and its labeling approved by the EPA. *Id.*; § 136a(a). The review procedure requires that an applicant submit a proposed label to the EPA for approval. The label must address various concerns, including ingredients, directions for use, and adverse effects of the product. *Ackles, supra*; § 136a(c). "'The objectives and purposes of FIFRA include the strengthening of federal standards, increasing EPA authority for their enforcement, and providing a comprehensive and uniform

regulation of the labeling, sale, and use of pesticides.'" *Welchert v. American Cyanamid, Inc.*, 59 F.3d 69, 71 (8th Cir. 1995).

FIFRA, at 7 U.S.C. § 136(p), defines label and labeling as follows:

> **(1) Label**
> The term "label" means the written, printed, or graphic matter on, or attached to, the pesticide or device or any of its containers or wrappers.
> **(2) Labeling**
> The term "labeling" means all labels and all other written, printed, or graphic matter—
> (A) accompanying the pesticide or device at any time; or
> (B) to which reference is made on the label or in literature accompanying the pesticide or device . . . .

FIFRA contains specific preemption language for labeling-based claims, yet it also allows the states to regulate the use of a product. Section 136v provides in part:

> **(a) In general**
> A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by [FIFRA].
> **(b) Uniformity**
> Such State shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under [FIFRA].

(c) *Cipollone*, *Medtronic, Inc.*, and *Ackles*

The U.S. Supreme Court has never addressed the issue whether FIFRA preempts common-law causes of action. The

Court, however, decided two cases involving other statutes that courts rely on when deciding issues regarding preemption under FIFRA.

In Cipollone v. Liggett Group, Inc., 505 U.S. 504, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992), the Court addressed the issue whether the Federal Cigarette Labeling and Advertising Act (1965 Act), as amended by the Public Health Cigarette Smoking Act of 1969 (1969 Act), preempted common-law claims—including design defect and failure-to-warn claims. The 1965 Act provided that "[n]o statement relating to smoking and health shall be required in the advertising of any cigarettes the packages of which are labeled in conformity with the provision of this chapter." 15 U.S.C. § 1334(b) (Supp. V 1965-69). The 1969 Act's preemption clause provides: "No requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter." 15 U.S.C. § 1334(b) (2000).

Concerning the 1965 Act, the Court stated that Congress spoke precisely and narrowly by using the term "statement." Thus, the Court determined that on its face, the preemption section of the 1965 Act prohibited only rulemaking bodies from mandating particular cautionary statements on cigarette labels. In determining the preemptive effect of the 1969 Act—a plurality of the Court held that unlike the 1965 Act—the 1969 Act preempted state common-law failure-to-warn claims that were based on advertising. The plurality's focus was on the terms "requirement or prohibition" in the 1969 Act. The plurality stated:

> Compared to its predecessor in the 1965 Act, the plain language of the pre-emption provision in the 1969 Act

> is much broader. First, the later Act bars not simply "statement[s]" but rather "requirement[s] or prohibition[s] . . . imposed under State law." Second, the later Act reaches beyond statements "in the advertising" to obligations "with respect to the advertising or promotion" of cigarettes.

Cipollone, 505 U.S. at 520.

The plurality rejected an argument that common-law damages actions do not impose "requirement[s] or prohibition[s]," stating that this argument was at odds with the plain language of the 1969 Act and the general understanding of common-law damages actions. The Court reasoned:

> The phrase "[n]o requirement or prohibition" sweeps broadly and suggests no distinction between positive enactments and common law; to the contrary, those words easily encompass obligations that take the form of common-law rules. As we noted in another context, "[state] regulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy."

505 U.S. at 521, citing *San Diego Unions v. Garmon*, 359 U.S. 236, 79 S. Ct. 773, 3 L. Ed. 2d 775 (1959).

The plurality also rejected an argument that the phrase "imposed under State law" excluded common-law actions, stating that it previously recognized that "State law" included common-law rules of liability. The Court noted that the preemption clause did not preempt all common law, but only those actions predicated on a theory that necessarily interferes with the 1969 Act. The Court determined that the plaintiff's

failure-to-warn claim was preempted because it was specifically at odds with the labeling requirement of the 1969 Act.

After the decision in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992), every federal court of appeals to address the issue has held that common-law labeling-based failure-to-warn claims brought against manufacturers of pesticides or herbicides are preempted by FIFRA. See *Ackles v. Luttrell*, 252 Neb. 273, 561 N.W.2d 573 (1997), *cert. denied* 522 U.S. 928, 118 S. Ct. 329, 139 L. Ed. 2d 255 (citing *Welchert v. American Cyanamid, Inc.*, 59 F.3d 69 (8th Cir. 1995); *Taylor AG Industries v. Pure-Gro*, 54 F.3d 555 (9th Cir. 1995); *Lowe v. Sporicidin Intern.*, 47 F.3d 124 (4th Cir. 1995); *Bice v. Leslie's Poolmart, Inc.*, 39 F.3d 887 (8th Cir. 1994); *MacDonald v. Monsanto Co.*, 27 F.3d 1021 (5th Cir. 1994); *Worm v. American Cyanamid Co.*, 5 F.3d 744 (4th Cir. 1993); *King v. E.I. Dupont De Nemours and Co.*, 996 F.2d 1346 (1st Cir. 1993), *cert. dismissed* 510 U.S. 985, 114 S. Ct. 490, 126 L. Ed. 2d 440; *Shaw v. Dow Brands, Inc.*, 994 F.2d 364 (7th Cir. 1993); *Papas v. Upjohn Co.*, 985 F.2d 516 (11th Cir. 1993), *cert. denied* 510 U.S. 913, 114 S. Ct. 300, 126 L. Ed. 2d 248; *Arkansas-Platte & Gulf v. Van Waters & Rogers*, 981 F.2d 1177 (10th Cir. 1993), *cert. denied* 510 U.S. 813, 114 S. Ct. 60, 126 L. Ed. 2d 30).

In addition, numerous state appellate courts hold that FIFRA preempts labeling-based common-law causes of action. See, e.g., *Ackles, supra*; *Schuver v. E.I. Du Pont de Nemours & Co.*, 546 N.W.2d 610 (Iowa 1996), *cert. denied* 519 U.S. 910, 117 S. Ct. 274, 136 L. Ed. 2d 197; *Hochberg v. Zoecon Corp.*, 421 Mass. 456, 657 N.E.2d 1263 (1995); *Quest Chemical Corp. v. Elam*, 898 S.W.2d 819 (Tex. 1995); *All-Pure Chemical Co. v. White*, 127 Wash. 2d 1, 896 P.2d 697 (1995); *Jenkins v. Amchem Products, Inc.*, 256 Kan. 602, 886 P.2d 869 (1994),

cert. denied 516 U.S. 820, 116 S. Ct. 80, 133 L. Ed. 2d 38 (1995).

After the decisions of these courts, the U.S. Supreme Court, in *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996), revisited its decision in *Cipollone*. In *Medtronic, Inc.*, the plaintiff, who was injured when her pacemaker failed, sought to recover damages under Florida common law. The manufacturer contended that the claims were preempted under the Medical Device Amendments of 1976 (MDA).

Under the MDA, the Food and Drug Administration (FDA) prohibits marketing certain classes of medical devices, including pacemakers, without assurances that the devices are safe and effective. This requirement subjects a company to a rigorous premarket approval process. *Medtronic, Inc., supra.* See 21 U.S.C. § 360e (1994). But the MDA provided a grandfather clause that allowed existing devices to remain on the market during the approval process. The MDA also allowed devices that were substantially equivalent to preexisting devices to avoid the rigorous approval process by filing a notice and completing a relatively simple approval process referred to as a "'§ 510(k) process.'" *Medtronic, Inc.*, 518 U.S. at 478. See 21 U.S.C. § 360(b). The pacemaker at issue in *Medtronic, Inc.* was approved under this "§ 510(k) process."

The MDA provides in part:

> [N]o State or political subdivision of a State may establish or continue in effect with respect to a device intended for human use any requirement—
> (1) which is different from, or in addition to, any requirement applicable under this chapter to the device, and

> (2) which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device under this chapter.

21 U.S.C. § 360k(a) (2000). The Court's plurality held that the MDA generally does not preempt common-law damages claims.

The Court focused on the term "requirement" in the MDA. The plurality reasoned that

> if Congress intended to preclude all common-law causes of action, it chose a singularly odd word with which to do it. The statute would have achieved an identical result, for instance, if it had precluded any "remedy" under state law relating to medical devices. "Requirement" appears to presume that the State is imposing a specific duty upon the manufacturer, and although we have on prior occasions concluded that a statute pre-empting certain state "requirements" could also pre-empt common-law damages claims, see *Cipollone*, 505 U.S., at 521-522 (opinion of Stevens, J.), that statute did not sweep nearly as broadly as Medtronic would have us believe that this statute does.

Medtronic, Inc., 518 U.S. at 487-88.

The plurality noted that the act at issue in *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992), prohibited state requirements that were "based on smoking and health" and that common-law claims not based on smoking and health were not preempted. Concerning the MDA in *Medtronic, Inc.*, however, the plurality determined that an examination of the entire MDA makes it apparent that the term "'requirements,'" as used throughout, "is linked with

language suggesting that its focus is device-specific enactments of positive law by legislative or administrative bodies, not the application of general rules of common law by judges and juries." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 489, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996). See, also, *Ackles v. Luttrell*, 252 Neb. 273, 561 N.W.2d 573 (1997), *cert. denied* 522 U.S. 928, 118 S. Ct. 329, 139 L. Ed. 2d 255 (discussing *Medtronic, Inc.*).

In *Ackles*, this court held that FIFRA preempted common-law failure-to-warn claims. The plaintiff, a mail carrier, was delivering mail when he became exposed to an insecticide that was being sprayed on an adjacent cornfield. He then sought damages under theories of negligence and strict liability based on a failure of the manufacturer to warn him of the danger.

We addressed both *Cipollone* and *Medtronic, Inc.* and stated: "[W]hile at first blush *Medtronic, Inc.* appears to retreat from the preemption analysis put forth in *Cipollone*, it was the separate and distinct statutes that were involved in each case that were the determining factor." *Ackles*, 252 Neb. at 281, 561 N.W.2d at 578. We then noted other courts which held that the preemption language employed in FIFRA was more similar to the statutory language in *Cipollone* than the statutory language in *Medtronic, Inc. Ackles, supra* (citing *Lewis v. American Cyanimid Co.*, 294 N.J. Super. 53, 682 A.2d 724 (1996), *aff'd as modified* 155 N.J. 544, 715 A.2d 967 (1998), and *Grenier v. Vermont Log Bldgs., Inc.*, 96 F.3d 559 (1st Cir. 1996)). See, also, S. Douglas Fish, Note, *In Defense of FIFRA Preemption of Failure to Warn Claims*, 12 J. Nat. Resources & Env. Law 123 (1996-97) (discussing *Medtronic, Inc.*). In particular, we relied on the following reasoning from a New Jersey case:

[L]ike the preemption clause at issue in *Cipollone* and

> unlike that in *Medtronic*, the preemption provision of FIFRA is precise and explicit; *i.e.*, a State 'shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under this subchapter.' Furthermore, FIFRA, like the *Cipollone* statutes, leaves unconstrained all state common law causes of action for defective products except those based on inadequate labels. Finally, FIFRA has no escape clauses like the 'grandfathering' and 'substantially equivalent' provisions of MDA. The statute and regulations provide that substantially all pesticides are subject to extensive review by the EPA, and the EPA prescribes precise content for pesticide labels . . . ."

Ackles, 252 Neb. at 281-82, 561 N.W.2d at 578, quoting *Lewis v. American Cyanimid Co., supra.*

(d) Decisions Since *Ackles*

Since our decision in Ackles, a majority of courts continue to hold that FIFRA preempts labeling-based failure-to-warn claims. See, e.g., *Netland v. Hess & Clark, Inc.*, 284 F.3d 895 (8th Cir. 2002) (rehearing and rehearing en banc denied); *Grenier, supra*; *Arnold v. Dow Chemical Co.*, 91 Cal. App. 4th 698, 110 Cal. Rptr. 2d 722 (2001); *Etcheverry v. Tri-Ag*, 22 Cal. 4th 316, 993 P.2d 366, 93 Cal. Rptr. 2d 36 (2000); *Ackerman v. American Cyanamid Co.*, 586 N.W.2d 208 (Iowa 1998); *Didier v. Drexel Chem. Co.*, 86 Wash. App. 795, 938 P.2d 364 (1997); *Lewis, supra.*

Since *Ackles*, two courts have held that failure-to-warn claims are not preempted by FIFRA. *Sleath v. West Mont Home Health Services*, 304 Mont. 1, 16 P.3d 1042 (2000), *cert. denied* ___ U.S. ___, 122 S. Ct. 40, 151 L. Ed. 2d 13 (2001);

Brown v. Chas. H. Lilly Co., 161 Or. App. 402, 985 P.2d 846 (1999), *review denied* 330 Or. 138, 6 P.3d 1098 (2000).

2. Eyl's Arguments

(a) Preemption

Eyl asks this court to reverse our decision in *Ackles v. Luttrell*, 252 Neb. 273, 561 N.W.2d 573 (1997), *cert. denied* 522 U.S. 928, 118 S. Ct. 329, 139 L. Ed. 2d 255, and determine that FIFRA does not preempt common-law failure-to-warn claims because of the reasoning of *Sleath, supra*. He argues that under *Medronic, Inc. v. Lohr*, 518 U.S. 470, 116 S. Ct. 2240, 135 L. Ed. 2d 700 (1996), FIFRA does not preempt failure-to-warn claims and asks this court to adopt the position of the EPA that was set forth in an amicus brief filed in *Etcheverry, supra*.

In *Sleath, supra*, the Montana Supreme Court overruled a previous case in which it held that common-law failure-to-warn claims were preempted by FIFRA. *Sleath, supra*, overruling *McAlpine v. Rhône-Poulenc Ag. Co.*, 285 Mont. 224, 947 P.2d 474 (1997). In reaching this determination, the court considered the amicus brief filed by the EPA in *Etcheverry, supra*, in which the EPA argued that FIFRA did not preempt state law claims. The court determined that it should consider the government's position on the issue and gave it deference. The court also discussed *Medtronic, Inc.*, which it had not previously considered, and concluded that in the light of that case, FIFRA did not preempt state law claims for damages.

We decline to adopt the position taken by the Montana Supreme Court. First, we have already considered the effect of *Medtronic, Inc.* on the issue of FIFRA preemption in *Ackles* and determined that FIFRA preempts failure-to-warn claims.

Second, we give no deference to the EPA's position in the amicus brief filed in *Etcheverry*. The *Etcheverry* brief was written for that specific case. The EPA did not file an amicus brief with this court in this case. Nor have we found—outside of *Etcheverry*—a similar brief filed by the EPA in any of the numerous other cases which have discussed FIFRA preemption. In addition, the record is silent whether the view expressed in the *Etcheverry* brief was an EPA official policy statement for all cases and if the EPA still adheres to that view. Further, we note that in *Etcheverry*, the California Supreme Court did not adopt the EPA's arguments. See *Etcheverry, supra*. Under these circumstances, we give no deference to the position taken in the *Etcheverry* brief.

Finally, the Eighth Circuit Court of Appeals recently considered and rejected the same arguments asserted by Eyl. *Netland v. Hess & Clark, Inc.*, 284 F.3d 895 (8th Cir. 2002) (rehearing and rehearing en banc denied). In *Netland*, the appellant requested the Eighth Circuit to overrule precedent holding that FIFRA preempts state common-law failure-to-warn claims based on *Medtronic, Inc., supra*, *Sleath, supra*, and *Brown, supra*, and on the EPA's brief in *Etcheverry, supra*. The Eighth Circuit panel stated that it would not overrule a prior decision unless it did so en banc. The plaintiff in *Netland* then sought rehearing en banc, which was denied. The continuing position of the Eighth Circuit is that state common-law failure-to-warn claims are preempted by FIFRA.

[8] The overwhelming majority of jurisdictions hold that FIFRA preempts state common-law failure-to-warn claims. We agreed with this position in *Ackles, supra*. We decline to now overrule *Ackles*. We hold that Eyl's failure-to-warn claims are preempted by FIFRA.

(b) Argument That Eyl's Claims Are Not Labeling Based

Eyl contends that Ciba-Geigy should have provided notice of the dangers of Pramitol to the general public through "signs, flags, newspaper notices, etc." Reply brief of appellee Eyl at 14. He argues that FIFRA applies to preempt only claims that are labeling based and directed to the actual user of a product. He argues that his claim was not labeling based because he was a bystander and was seeking damages for failure to warn that a chemical had been applied instead of basing his claim on the existing Pramitol label. For purposes of this opinion, we assume, without deciding, that Eyl, as an employee of the applicator, was a bystander.

[9,10] Whether a particular form of warning comes within the definitions of "label" and "labeling" set forth in 7 U.S.C. § 136(p) is a matter of statutory interpretation. In the absence of anything to the contrary, statutory language is to be given its plain and ordinary meaning; an appellate court will not resort to interpretation to ascertain the meaning of statutory words which are plain, direct, and unambiguous. *In re Application No. C-1889, ante* p. 167, 647 N.W.2d 45 (2002). If the language of a statute is clear, the words of such statute are the end of any judicial inquiry regarding its meaning. *Gracey v. Zwonechek*, 263 Neb. 796, 643 N.W.2d 381 (2002). The question is whether warning flags, posters, or signs supplied by the manufacturer and aimed at warning that a pesticide has been applied or of its dangers are part of the label or labeling under FIFRA. We conclude that they are.

In cases where the plaintiff claims that the lack of point-of-sale signs or consumer notices are not related to labeling and packaging, the overwhelming majority of courts hold that FIFRA preempts the claims. *Taylor AG Industries v. Pure-Gro*, 54 F.3d 555 (9th Cir. 1995); *Worm v. American Cyanamid Co.*, 5 F.3d 744 (4th Cir 1993); *Papas v. Upjohn Co.*, 985 F.2d 516

(11th Cir. 1993), *cert. denied* 510 U.S. 913, 114 S. Ct. 300, 126 L. Ed. 2d 248; *Dow Chemical Co. v. Ebling*, 723 N.E.2d 881 (Ind. App. 2000) (*Ebling I*), *vacated in part on other grounds* 753 N.E.2d 633 (Ind. 2001); *Jenkins v. Amchem Products, Inc.*, 256 Kan. 602, 886 P.2d 869 (1994), *cert. denied* 516 U.S. 820, 116 S. Ct. 80, 133 L. Ed. 2d 38 (1995); *Hopkins v. American Cyanamid Co.*, 666 So. 2d 615 (La. 1996); *Wadlington v. Miles, Inc.*, 922 S.W.2d 520 (Tenn. App. 1995); *Goodwin v. Bacon*, 127 Wash. 2d 50, 896 P.2d 673 (1995). See, *Kuiper v. American Cyanamid Co.*, 131 F.3d 656 (7th Cir. 1997), *cert. denied* 523 U.S. 1137, 118 S. Ct. 1839, 140 L. Ed. 2d 1090 (1998) (alleged misrepresentation in advertising separate from label is labeling based when it reiterates information on label); *Andrus v. AgrEvo USA Co.*, 178 F.3d 395 (5th Cir. 1999) (agreeing with *Kuiper, supra*).

In *Papas, supra*, a worker at a humane society suffered injuries after applying a pesticide to dogs at his workplace. See *Papas v. Upjohn Co.*, 926 F.2d 1019 (11th Cir. 1991), *vacated and remanded on other grounds* 505 U.S. 1215, 112 S. Ct. 3020, 120 L. Ed. 2d 892 (1992). After remand from the U.S. Supreme Court to consider the case in the light of *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 112 S. Ct. 2608, 120 L. Ed. 2d 407 (1992), the Eleventh Circuit held that point-of-sale signs, consumer notices, or other informational materials were labeling based. In addressing the issue, the court stated:

> Appellants urge us to hold that their warning claims "unrelated to labeling and packaging" are not pre-empted by section 136v. They contend that because the language of 136v refers only to "labeling or packaging," the section does not pre-empt failure to warn claims based on point-of-sale signs, consumer notices, or other informational materials that are "unrelated" to labeling and packaging. But any claims

> that point-of-sale signs, consumer notices, or other informational materials failed adequately to warn the plaintiff[s] necessarily challenge the adequacy of the warnings provided on the product's labeling or packaging. If a pesticide manufacturer places EPA-approved warnings on the label and packaging of its product, its duty to warn is satisfied, and the adequate warning issue ends. Plaintiffs may not interfere with the FIFRA scheme by bringing a common law action alleging the inadequacy of, for example, point-of-sale signs. Because claims challenging the adequacy of warnings on materials other than the label or package of a product necessarily imply that the labeling and packaging failed to warn the user, we conclude that these claims are also pre-empted by FIFRA.

Papas, 985 F.2d at 519. See, also, *Taylor AG Industries, supra*; *Ebling I*; *Hopkins, supra*; *Wadlington, supra*; *Goodwin, supra*.

Shortly after *Papas* was decided by the 11th Circuit, the 4th Circuit agreed, stating:

> To allow the [plaintiffs] to argue that the warning language which appears on point-of-sale or other promotional material is inadequate when that language is identical to that approved by the EPA would in effect allow the establishment of an additional or different state law requirement concerning adequate warning language.

Worm, 5 F.3d at 748. See, also, *Jenkins, supra* (agreeing with *Papas, supra*, and *Worm, supra*).

Agreeing with the view taken in *Papas v. Upjohn Co.*, 985 F.2d 516 (11th Cir. 1993), *cert. denied* 510 U.S. 913, 114 S. Ct. 300, 126 L. Ed. 2d 248, and similar cases about point-of-

sale signs and similar devices, the Court of Appeals of Indiana further addressed the plain language of § 136(p). *Ebling I*. In *Ebling I*, an applicator sprayed an apartment with a pesticide before, and possibly for a short time after, the plaintiffs, a family, moved in. The plaintiffs were not provided with labeling information regarding the pesticide before they were exposed. The children later developed seizure disorders, and the plaintiffs filed suit against the applicator and the manufacturer.

On appeal, the plaintiffs argued that the defendants owed a common-law duty to distribute additional materials warning of the product to people whose homes were being sprayed. The Indiana Court of Appeals rejected this argument because of the definitions of "label" and "labeling" contained in § 136(p). The court noted that FIFRA has a broad definition of labeling that does not require the labeling materials to be affixed to the pesticide. Applying the language of § 136(p), the court stated:

> Thus, any written information that a pesticide registrant disseminates with a pesticide is considered "labeling" under FIFRA, and any obligation placed upon a registrant in this regard is necessarily a labeling requirement. From this language, it is clear that Congress intended to preempt state common law actions that would impose requirements on a registrant to disseminate additional written matter with its product, regardless of whether this matter was identical to the EPA-approved labeling information.

Ebling I, 723 N.E.2d at 897. The court then stated its agreement with *Papas, supra*, and similar cases. The court held that FIFRA preempted claims against both the manufacturer and the applicator. On further review, the Supreme Court of Indiana

reversed the decision regarding the applicator, but summarily affirmed the decision regarding the manufacturer. *Dow Chemical Co. v. Ebling*, 753 N.E.2d 633 (Ind. 2001) (*Ebling II*).

Eyl's argument that Ciba-Geigy should have provided notice of the dangers of Pramitol to the general public through "signs, flags, newspaper notices, etc." is off the mark. As previously noted, the overwhelming majority of jurisdictions hold that these types of warnings are labeling based. Under § 136(p), labeling means all labels and all other written, printed, or graphic matter accompanying the pesticide or device at any time. A warning flag or sign in this case consists of some form of written or graphic material provided by the manufacturer that will accompany the product at some time. This alone meets the plain language of "labeling" under § 136(p). The definition of "label" is also met, because additional warning materials or devices that a manufacturer provides would need to be "attached to, the pesticide or device or any of its containers or wrappers." 136(p)(1). In addition, Eyl argues that the public should have been warned of Pramitol's dangers. This, however, would require some type of printed information. In that case, the warning would then have to incorporate language from the direct product label and information about the warning system would need to be incorporated into the directions for use on the label—information that also falls under the statutory definition of "label" and "labeling."

Further, considerations such as (1) whether warning devices such as flags are needed, (2) what they should look like, (3) what printed material they should contain, and (4) how they should be used and for how long are all factors that would affect the types of warnings provided from the manufacturer and are properly part of the EPA review process. The purpose of FIFRA preemption is to create a uniform system of labeling

across the country. Requiring manufacturers to provide additional warning devices to some states and not to others frustrates the goal of FIFRA preemption.

But Eyl argues that flags and other such warning devices are not labeling based and thus not preempted. He relies on cases dealing with ordinances affecting applicators. He argues that if an applicator can be required to provide warning flags, then a manufacturer should also be required to provide that type of warning.

Eyl's reasoning ignores the reason why a warning provided by an applicator—as opposed to a manufacturer—is not labeling based. Although FIFRA prevents states from implementing additional or different labeling requirements on manufacturers under § 136v(b), it specifically allows states to regulate the "use" of pesticides by applicators under § 136v(a). In applicator cases, it is the applicator, not the manufacturer, who is responsible for providing the warning. The manufacturer is not required to take any action whatsoever in providing the warning devices. Nor is the manufacturer required to alter the labeling. As a result, when an applicator is required to provide label information, the labeling approved by the EPA and provided by the manufacturer is unaffected and the regulation is simply a regulation on the use of the product under § 136v(a). But if a *manufacturer* is required to provide items such as warning flags, then the labeling of the product is involved, which labeling requirement is preempted by FIFRA. The applicator cases make this point clear.

In *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 111 S. Ct. 2476, 115 L. Ed. 2d 532 (1991), an applicator case, the U.S. Supreme Court determined that an ordinance that required applicators to obtain a permit before application of certain pesticides and to place placards containing notice of the

pesticide and label information was not preempted by FIFRA. In reaching this conclusion, the Court relied specifically on the language in § 136v(a). Section 136v(a) provides that states may regulate the sale or use of pesticides so long as the state regulation does not permit a sale or use prohibited by FIFRA. The Court specifically noted that FIFRA does not expressly supersede local regulation of pesticide use. The Court did not base its reasoning on a definition of "labeling." Instead, the Court recognized that the ability to regulate use does not give states any greater power over their ability to regulate labeling. The Court stated:

> The specific grant of authority in § 136v(a) consequently does not serve to hand back to the States powers that the statute had impliedly usurped. Rather, it acts to ensure that the States could continue to regulate use and sales even where, such as with regard to the banning of mislabeled products, a narrow pre-emptive overlap might occur.

Mortier, 501 U.S. at 614. Another court describes the difference by stating, "Labeling regulation represents a subset of use regulation. *Mortier's* permissible overlap allows states to ban EPA-registered pesticides . . . . The explicit language of section 136v(b), however, completely preempts any state regulation of the labeling itself." *Goodwin v. Bacon*, 127 Wash. 2d 50, 65, 896 P.2d 673, 681 (1995) (holding that claims based on point-of-sale signs are preempted).

The difference between regulating the use of a product by requiring applicators to provide warnings and a preempted labeling-based claim when a manufacturer is required to provide warnings is illustrated in *Ebling I* and *Ebling II*. In *Ebling I*, the Indiana Court of Appeals held that failure-to-warn claims based on a lack of notice to nonusers were preempted

against both the manufacturer and the applicator. The Indiana Supreme Court granted review and reversed the conclusion of preemption for the applicator but affirmed for the manufacturer. In reaching the conclusion that the imposition of a duty to warn on an applicator is not preempted, the court made note of § 136v(a), which allows State regulation of pesticide use. The court noted:

> While FIFRA requires pesticide manufacturers to affix an approved label to their product in order to sell it, applicators, either commercial or private, are not required to label anything but, as with members of the general public, applicators are prohibited from detaching, altering, defacing, or destroying the label affixed to the pesticide by the manufacturer. 7 U.S.C. § 136j(2). The law is fairly settled that when a pesticide *manufacturer* "places EPA-approved warnings on the label and packaging of its products, its duty to warn is satisfied, and the adequate warning issue ends." *Papas v. Upjohn Co.*, 985 F.2d 516, 519 (11th Cir.1993). Because of the absence of an affirmative FIFRA labeling requirement for *applicators*, however, we find that the alleged state tort law duty imposed upon applicators to convey the information in the EPA-approved warnings to persons placed at risk does not constitute a requirement additional to or different from those imposed by FIFRA.

(Emphasis in original.) *Ebling II*, 753 N.E.2d at 639.

The court then stated: "From *Mortier*, we discern that, like a state or local regulatory scheme that requires permits and notice to the non-user consumer/bystander and imposes penalties, the imposition of a duty to warn on applicators is not preempted by FIFRA." *Ebling II*, 753 N.E.2d at 640. The court,

however, summarily affirmed that the claims against the manufacturer were preempted. See, also, *Mann v. H.W. Andersen Products, Inc.*, 246 A.D.2d 68, 676 N.Y.S.2d 658 (1998) (claims by deformed child brought against mother's employer, where employer's use of pesticide exposed mother to pesticide, were not preempted, but claims against manufacturer were preempted).

The other applicator cases that Eyl relies on do not hold that a failure-to-warn claim brought against a *manufacturer* for failure to place devices such as warning flags is not a labeling-based claim. Instead, these cases address the narrow issue about whether such claims when brought against *applicators* are a requirement affecting the use of a product instead of being a labeling-based action. See, e.g., *New York State Pesticide Coalition v. Jorling*, 874 F.2d 115 (2d Cir. 1989).

In most of the cases cited by Eyl, applicators of pesticides or herbicides were being regulated. If an ordinance requires an applicator to provide warnings that a product has been applied, the product's use under § 136v(a) is regulated without imposing additional labeling requirements on the manufacturer that are preempted under § 136v(b). Instead of imposing an additional burden on the manufacturer, and thus requiring the manufacturer to violate FIFRA, the applicators are simply being required in their use of the product to relay information to additional people. But if a manufacturer is required to provide additional warning materials, such as flags, signs, advertisements, or other notices, the manufacturer is being required to change the label of the product: This must be approved by the EPA, and such a requirement on the manufacturer is preempted by FIFRA.

Eyl also relies on a federal trial court opinion holding that the Cigarette Labeling and Advertising Act, the 1965 Act

discussed earlier, does not preempt failure-to-warn claims that are made by a bystander who was injured from inhaling secondhand smoke. *Wolpin v. Phillip Morris, Inc.*, 974 F. Supp. 1465 (S.D. Fla. 1997). In addition, he cites *Chemical Specialties Mfrs. Ass'n, Inc. v. Allenby*, 958 F.2d 941 (9th Cir. 1992), and *Macrie v. SDS Biotech Corp.*, 267 N.J. Super. 34, 630 A.2d 805 (1993). We find these cases unpersuasive and contrary to the majority of FIFRA preemption cases that address the issue whether FIFRA preempts failure to warn claims that are not directly based on the language of the label. See *Ebling I* (disagreeing with *Macrie, supra*).

In sum, under FIFRA, the inclusion of warning flags or other such materials encompasses the concept of providing information to others that there are adverse effects associated with the product. Requiring a manufacturer to provide warning signs, flags, or other devices constitutes "labeling" under the plain language of § 136(p). Claims challenging the adequacy of warnings on materials other than the direct label or package of a product necessarily infer that the labeling and packaging failed to warn. Because the manufacturer and distributor would be in no position to actually place warnings on the sites where products were being applied, the only manner in which the manufacturer could prevent liability would be to add the warning devices as part of the labeling and packaging. See *All-Pure Chemical Co. v. White*, 127 Wash. 2d 1, 896 P.2d 697 (1995).

[11] *Papas v. Upjohn Co.*, 985 F.2d 516 (11th Cir. 1993), *cert. denied* 510 U.S. 913, 114 S. Ct. 300, 126 L. Ed. 2d 248, and the overwhelming majority of jurisdictions that have considered this issue agree that claims based on the lack of point-of-sale signs and other such devices are labeling based and are preempted by FIFRA. Even assuming that Eyl, as an employee of the City of Wisner, was a bystander, the status of

a plaintiff as a bystander does not have an effect on this determination. The effect of the plain language of § 136(p) remains the same: Labeling-based failure-to-warn claims against manufacturers are preempted. The plaintiff's status makes no difference in the determination. See *Ebling I* and *Ebling II*. We hold that Eyl's claims are labeling-based failure-to-warn claims that are preempted by FIFRA.

(c) Application of Preemption to Distributors

After this case was submitted to this court following argument, we ordered the parties to provide supplemental briefs regarding whether a failure-to-warn claim is preempted when brought against a distributor. The U.S. Court of Appeals for the Ninth Circuit determined that when a "distributor's liability is essentially predicated upon the language in the manufacturer's label, we apply FIFRA's preemption provision equally to manufacturers and distributors." *Taylor AG Industries v. Pure-Gro*, 54 F.3d 555, 562 (9th Cir. 1995). Other jurisdictions generally assume that FIFRA preempts state law failure-to-warn claims against both manufacturers and distributors. See, e.g., *Arnold v. Dow Chemical Co.*, 91 Cal. App. 4th 698, 110 Cal. Rptr. 2d 722 (2001); *Hughes v. Tennessee Seeds of Brownsville, Inc.*, 970 S.W.2d 471 (Tenn. App. 1997). We agree.

[12] Eyl's failure-to-warn claims are labeling based. Under FIFRA, a manufacturer or distributor cannot change a label. Because Eyl predicates his failure-to-warn claims on the quality of the warning, his claims are preempted against both the manufacturer and the distributor.

V. CONCLUSION

We determine that Eyl's common-law failure-to-warn claims are labeling based and preempted by FIFRA. The only

claims submitted to the jury in this case were Eyl's negligence and strict liability failure-to-warn claims. The court did not submit any nonpreempted claims to the jury, and Eyl does not cross-appeal the trial court's decision to not submit a design defect claim to the jury. We hold that Eyl's claims are preempted and that the district court erred in failing to sustain the appellants' motions for a directed verdict and judgment notwithstanding the verdict. We reverse, and remand with directions to dismiss. Because we reverse, and remand with directions to dismiss, we do not address Eyl's remaining assignments of error.

REVERSED AND REMANDED WITH
DIRECTIONS TO DISMISS.

IN THE DISTRICT COURT OF COMING COUNTY, NEBRASKA

HAROLD EYL,	)	CASE NO. 9033
Plaintiff,	)	
v.	)	ORDER
	)	
CIBA-GEIGY CORPORATION,	)	
et al.,	)	
	)	
Defendants.	)	

This case came on for hearing on October 1, 1998, on the motions for summary judgment of the defendants Ciba-Geigy Corporation and Northeast Cooperative. Appearances were: James K. McGough for plaintiff; William J. Brennan for defendant Ciba-Geigy Corporation; Jay L. Welch for defendant Northeast Cooperative; and Susan E. Fieber for defendant City of Wisner. Evidence was adduced and arguments were made. The Court reserved ruling on the offer of certain exhibits, and the matter was taken under advisement.

EVIDENCE

The Court reserved ruling on portions of Exhibit 10, Exhibit 13, and Exhibits 14-22, inclusive.

Exhibit 10 is an affidavit of Kristine Woodke which attaches copies of several other affidavits and excerpts from the Code of Federal Regulations. The affidavit of Kristine Woodke is irrelevant, but the parties have waived any objection to the submission of copies of the remaining affidavits as not being

the best evidence. Parts of the Christopher Huerter affidavit are objected to for lack of foundation and all of the Michael Maynard affidavit is objected to on the same grounds. The objection to Dr. Huerter's testimony goes to weight, not admissibility. The affidavit reveals that he is qualified to make a diagnosis of livedoid vasculitis and provides sufficient foundation for the opinion that exposure to Pramitol did not cause plaintiff's condition. The objections to the Huerter affidavit are therefore overruled.

As to Michael 5. Maynard's affidavit, there is insufficient foundation to show that Dr. Maynard is qualified to state the opinion contained in paragraph 6. The objections to that affidavit are overruled with the exception of paragraph 6, which is sustained, and that paragraph is excluded.

The Richard Brahmer affidavit, Exhibit 13, establishes that the same is based on personal knowledge, sets forth facts that would be admissible in evidence, and is made by one competent to testify on the matter. That is what is required on a motion for summary judgment. Any contradictory language within the affidavit affects the weight of that evidence and is not a basis for objection to the affidavit. The objections to Exhibit 13 are therefore overruled, and Exhibit 13 is received.

Exhibits 14-22, inclusive, are objected to primarily on the basis of relevancy with the addition of lack of foundation as to Exhibit 18. The relevancy objections are overruled, and for the reasons set forth in the foregoing paragraph as to foundation, the objections to Exhibit 18 are also overruled. Those exhibits are received.

The Count having now considered the evidence and the law finds and orders as follows.

This case is based on two theories of recovery -- strict liability and negligence. Each will be separately discussed.

STRICT LIABILITY

At first blush it would appear that as a matter of law this theory of recovery should be dismissed against both Ciba-Geigy and Northeast Cooperative under the holding of Ackles v. Luttrell, 252 Neb. 273, 561 N.W.2d 573 (1997). However, that is not the situation. That case holds that failure to warn and labeling base claims brought under a common law cause of action against manufacturers of pesticides are preempted by the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA).

To recover against the defendant on a claim of strict liability, the plaintiff must prove by a preponderance of the evidence: (1) the defendant placed the product on the market for use and knew, or fn the exercise of reasonable care should have known, that the product would be used without inspection for defects; (2) the product was in a defective condition when it was placed on the market and left the defendant's possession; (3) the defect is the proximate or a proximately contributing cause of plaintiff's injuries sustained while the product was being used in the way and for the general purpose for which it was designed and intended; (4) the defect, if existent, rendered the product unreasonably dangerous and unsafe for its intended use; and (5) plaintiff's damages were a direct and proximate result of the alleged defect. Kudlacek v. Fiat S.p.A., 244 Neb. 822, 509 N.W.2d 603 (1994).

A **defect may** occur in one of two ways. The first, commonly labeled a manufacturing defect, is one in which the product differs from the specifications and plan of the manufacturer. Adams v. American Cyanamid Co., 1 Neb. App.337, 498 N.W.2d 577(1992) citing Nerud v. Haybuster Mfg., 215 Neb. 604, 340 N.W.2d 369 (1983). Here, there is no dispute that the product conformed to the label description and was not defective in that respect.

The second concept of a defective product is one in which the product meets the specifications of the manufacturer, but the product nonetheless poses an unreasonable risk of danger. This condition is generally characterized as a design defect. Adams, supra., at 343. This concept is what is in dispute in this case, and the evidence thus far so reflects. Of interest is the following comment in Ackles. In that case the Supreme Court stated: "In this cause of action, Ackles contends Pennwalt is strictly liable for placing a defective product, namely Penncap-M, into the stream of commerce. According to the sixth amended petition, the defects referred to are the following, and Pennwalt was negligent: . . c. in placing on the market for use a product which is toxic and creates an unreasonable dangerous condition when human beings such as the plaintiff become exposed to the product." Ackles, supra., at 276. This allegation is similar to that of the fifth amended petition against Northeast Cooperative in paragraph 9(n) and identical to the allegation against Ciba-Geigy in paragraph 10(o). The Supreme Court in Ackles goes on to state: "We note that an examination of subparagraph C of paragraph 34 reveals that it deals exclusively with the allegation that Penncap-M is 'unreasonably dangerous' and as such does not appear, on its face, to be a labeling claim." Ackles, supra., at 276 (emphasis added). The court went on to state that it would offer no opinion as to whether subparagraph C was preempted by FIFRA for the reason that the sole assigned error went to the labeling claim in the strict liability cause of action and not subparagraph C.

Even though certain of the allegations against primarily defendant Ciba-Geigy go to labeling, which is preempted by FIFRA, the remaining allegations go to disputed facts which are not labeling-based and cannot be determined as a matter of law on a motion for summary judgment. Therefore defendants' motions for summary judgment as to plaintiff's theory of

recovery on strict liability are overruled.

NEGLIGENCE

In Ackles, the theories of recovery were both negligence and strict liability, and summary judgment was entered by the trial court on both. The Supreme Court, however, bypassed the negligence issue.

A cause of action in negligence requires a legal duty on the part of the defendant to protect the plaintiff from injury, a failure to discharge that duty, and damage proximately caused by the failure to discharge that duty. Bargmann v. Soil Oil Co., 253 Neb. 1018, 574 N.W. 2d 478 (1998).

There is clearly a dispute as to proximate cause. The position of Dr. Tibbels, standing alone, is sufficient to constitute a factual dispute, the resolution of which is the province of the jury.

The question of whether a legal duty exists for actual negligence is a question of law, dependent upon the facts of the case. Bargmann, supra. Here, the duty is based on foreseeability which in and of itself is a question of fact. Here again, the evidence reflects a dispute as to foreseeability, which precludes summary judgment as to this theory of recovery.

The defendants' motions for summary judgment on plaintiff's theory of recovery for negligence are overruled.

STATUTE OF LIMITATIONS

Defendant Ciba-Geigy has also raised the issue of statute of limitations as to the assignment of the consortium claim. The Court has before it only the fifth amended petition. None of the four prior petitions were offered in connection with the motions for summary judgment. The arguments of counsel as to what those prior petitions contained, while helpful, are not evidence and cannot be considered. Further, it is not apparent

from the face of the fifth amended petition that the action for loss of consortium is barred by the statute of limitations. The motion for summary judgment on that cause of action is therefore overruled. Inasmuch as this issue was raised in defendants' answers, it may live to fight another day.

SUMMARY

For the reasons stated above, the motions for summary judgment of the defendants Ciba-Geigy Corporation and Northeast Cooperative are overruled in their entirety.

Dated: October 20, 1998

BY THE COURT:

_____

District Judge.

IN THE DISTRICT COURT OF CUMING COUNTY, NEBRASKA

HAROLD D. EYL, an individual, and CITY OF WISNER, a Political Subdivision, Plaintiffs,	)	Case No. 9033
v.	)	ORDER
CIRA-GEIGY CORPORATION, a New York Corporation, and NORTHEAST COOPERATIVE, a Cooperative Association, Defendants.	)	

The following rulings are made on the various motions pending before the Court which were heard November 2, 1999.

MOTION FOR PROTECTIVE ORDER

The Court previously directed the production of documents for review in camera in response to defendant Ciba-Geigy Corporation's motion for protective order. The Court finds that those documents are protected from discovery either as work product under Rule 26(b)(3) of the Nebraska Discovery Rules or by the attorney-client privilege, Rule 503.

The Court has also reviewed the documents submitted in conjunction with the defendant Ciba-Geigy Corporation's motion for protective order filed October 22, 1999. The Court likewise finds that those documents identified on the privilege log are not subject to discovery far the same reasons.

The defendant's motions for protective order are sustained.

MOTION FOR SUMMARY JUDGMENT

The Court will first address the plaintiff's claim for loss of consortium. The evidence now reflects that no assignment for loss of consortium was contained in the original petition filed April 4, 1997. That assignment was included with the Fifth Amended Petition. This was more than four years after the cause of action accrued. As such the same is barred by the statute of limitations, Neb. Rev. Stat. Section 25-207 (Reissue 1995).

The amended motion for summary judgment on plaintiff's cause of action for consortium is sustained, and that cause is dismissed.

Second, the Court finds that there is no genuine issue of a material fact, and defendant Northeast Cooperative is entitled to a summary judgment as to plaintiff's theory of recovery for strict liability. There is no evidence that Northeast Cooperative was a manufacturer of the product or that it knew or had reason to know of any defect in the product. Therefore, this defendant is entitled to summary judgment as a matter of law pursuant to Neb. Rev. Stat. Section 25-21,181 (Reissue 1995).

Defendant Northeast Cooperative's motion for summary judgment as to strict liability is sustained and that theory of recovery is dismissed.

The remaining parts of defendants' motion for summary judgment are overruled for the reason that genuine issues of material fact remain which cannot be resolved *by* summary judgment. It is so ordered.

MOTION IN LIMINE

The defendants' motion in limine seeks to preclude plaintiffs', their counsel, and their witnesses "during any phase of this trial, either directly or indirectly, from making any statements and from offering any evidence" as to proposed

testimony of certain delineated expert witnesses.

The purpose of a motion in limine is not to obtain a final ruling upon the ultimate admissibility of evidence "but is rather to prevent the proponent of potentially prejudicial matter from displaying it to the jury, making statements about it before the jury, or presenting the matter to the jury in any manner until the trial court has ruled on its admissibility in the context of the trial itself... it serves the useful purpose of raising and pointing out before trial certain evidentiary rulings the Court may be called upon to make during the course of the trial...it is not a ruling on evidence and should not, except on clear showing, be used to reject evidence. It adds a procedural step to the offer of evidence." State v. Halsey, 232 Neb. 658, 441 N.W.2d 877 883 (1989).

Here, the defendants have made the Court aware of certain potential evidentiary rulings at trial. Admissibility of expert testimony is based on four factors: (1) whether the witness is qualified as an expert; (2) whether the testimony is relevant; (3) whether the testimony will assist the trier of fact; and (4) whether probative value of the testimony, even if relevant, is outweighed by the danger of unfair prejudice or other considerations. See Phillips v. Industrial Machine, 257 Neb. 256, _ N.W.2d _ ,(1999).

The defendants concerns as to the admissibility of the suspected testimony are foundational matters which may be addressed through voir dire of the expert prior to rendering an opinion or exploration of underlying facts on cross-examination. Defendants' motion in limine is generally overruled.

Dated: November 3, 1999.

BY THE COURT:

_____

District Judge.

NEBRASKA SUPREME COURT
AND NEBRASKA COURT OF APPEALS
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November 14, 2002

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IN CASE OF: S-00-000219, Eyl v. Ciba-Geigy Corporation

Appellees/Motion for Rehearing **filed** 09/16/02

has been reviewed by the court and the following order entered:

Motion of appellee for rehearing overruled.

Respectfully,

CLERK OF THE SUPREME COURT
AND COURT OF APPEALS